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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 477

RICHARD HUSTY AND CHARLES LAUREL,
PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 26, 1930

CERTIORARI GRANTED NOVEMBER 24, 1930

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(35,399)

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IN UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

No. 3446, Criminal

THE UNITED STATES

vs.

RICHARD HUSTY and CHARLES LAUREL

INDICTMENT—Filed Mar. 5, 1930

The Grand Jurors of the United States, duly selected, impaneled, and sworn to inquire in and for the Southern Division of the Western District of Michigan, upon their oaths do present and say:

Transportation Count

Count I

That heretofore and on or about, to wit, the 10th day of December, A. D. 1929, at, to wit, the City of Grand Rapids, in the County of Kent, in the State of Michigan, in said division of said district, and within the jurisdiction of this Court, Richard Husty and Charles Laurel then and there unlawfully did transport, namely, over and upon the public highways of the County of Kent and Streets of said city of Grand Rapids in said division and district, in an automobile, to wit, a Graham Paige Coupe certain intoxicating liquor, namely, spirituous liquor to wit, more or less, of whiskey so called, which said liquor then and there contained one-half of one per centum and more of alcohol by volume, and then and there was fit for use and [fol. 2] for beverage purposes, which said transportation then and there was prohibited and unlawful by virtue of the provisions of the National Prohibition Act; as amended.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

attorney and federal prohibition agent should not be restrained from making any use of the things found and information gained as a result of said search; and why such other relief should not be granted to petitioner as this Court shall deem just.

Richard Husty, Charles Laurel, Petitioners. P. F. Parrott, Atty. for Petitioners.

[fol. 5] IN UNITED DISTRICT COURT

AFFIDAVIT OF CHARLES LAUREL IN SUPPORT OF MOTION TO SUPPRESS

Charles Laurel being first duly sworn says that he is one of the defendants herein; that he has read the attached petition to suppress the evidence and that same is true.

That on the 10th day of December, 1929, he was arrested by one Arthur Scully, a Federal Prohibition Agent, upon one of the public streets in the city of Grand Rapids, Michigan.

That at the time and before said arrest affiant had not committed a misdemeanor or felony; that affiant was not at said time a fugitive from justice.

Affiant further says at the time of said arrest said Arthur Scully searched the automobile in which affiant was seated without a search warrant.

Affiant further says that said Arthur Scully arrested said affiant without due cause and searched said automobile without an honest belief based on reasonable grounds that the same contained contraband liquor.

Further affiant saith not.

Charles Laurel.

Sworn to before me and subscribed in my presence this 10th day of March, A. D. 1930. Julius J. Herscher, Notary Public, Kent County, Mich. My com. expires Nov. 2, 1930.

[fol. 6] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF RICHARD HUSTY IN SUPPORT OF MOTION TO SUPPRESS

Richard Husty being first duly sworn says that he is one of the defendants herein; that he has read the attached petition to suppress the evidence and that same is true.

That on the 10th day of December, 1929, he was arrested by one Arthur Scully, a Federal Prohibition Agent, upon one of the public streets in the city of Grand Rapids, Michigan.

That at the time and before said arrest affiant had not committed a misdemeanor or felony; that affiant was not at said time a fugitive from justice.

Affiant further says at the time of said arrest said Arthur Scully searched the automobile in which affiant was seated without a search warrant.

Affiant further says that said Arthur Scully arrested said affiant without due cause and searched said atuomobile without an honest belief based on reasonable grounds that the same contained contraband liquor.

Further affiant saith not.

Richard Husty.

Sworn to before me and subscribed in my presence this 10th day of March, A. D. 1930. Julius J. Herscher, Notary Public, Kent County, Mich. My com. expires Nov. 2, 1930.

IN UNITED STATES DISTRICT COURT

RULE TO SHOW CAUSE ON MOTION TO SUPPRESS EVIDENCE

This matter being opened to the Court by P. F. Parrott, Attorney for the Petitioners, and the Court having considered the verified petition of Richard Husty and Charles [fol. 7] Laurel, and the affiants filed in support thereof.

It is on this 11th day of March, 1930, ordered that Fred C. Wetmore, United States Attorney for the Western District of Michigan Southern Division, and Arthur Q. Scully, Federal Prohibition Director for said district, show cause

before this Court in the post office building in the city of Grand Rapids, on the 15th day of March, A. D. 1930, at a time that the Court can hear the same, why said United States Attorney and said Federal Prohibition Director should not be restrained from using in any way any information gained as a result of the search made without warrant; and why the things seized under color of law should not be returned to petitioners.

And it is further ordered that copies of this rule and of said petition and affidavits, which be read upon return of this rule, be served upon said United States Attorney and said Federal Prohibition Director.

Fred M. Raymond, United States District Judge.

In United States District Court

Findings of Court for Order Denying Motions—Filed March 12, 1930

March 12, 1930.

Mr. Orrie J. Sluiter, Clerk U. S. Court, Grand Rapids, Mich.

No. 3446, U. S. vs. Husty

Dear Sir: An order may be entered in the above entitled cause denying the petition to suppress evidence and all other relief prayed for by said petition.

Yours very truly, Fred M. Raymond, District Judge.

[fol. 8] In United States District Court

Demurrer—Filed Mar. 12, 1930

Now comes the defendants, by their Attorney, P. F. Parrott, and demur to the information, indictment and paper writing purporting to disclose the offense herein alleged for the following reasons:

1. That said information, indictment or paper writing does not state facts sufficient to contribute an offense under the laws of the United States.

2. That said information, indictment or paper writing does not state facts sufficient to constitute an offense under the National Prohibition Act, as amended.

5. The second count is an indictment which contravenes Section nine (IX) of Article one (I) of the Constitution of the United States of America as being ex post facto.

P. F. Parrott, Attorney for Defendants.

In United States District Court

Motion to Quash—Filed March 12, 1930

Now comes the defendants and move the Court for an order quashing the information, indictment, or paper writing purporting to disclose the offense herein alleged for the following reasons:

1. That the evidence upon which this prosecution is based was obtained by virtue of an unlawful search and seizure.

2. That the evidence upon which this prosecution is based was secured by an infraction of the provisions of the fourth amendment to the Constitution of the United States.

[fol. 9] 3. That the evidence upon which this prosecution is based was secured by an infraction of the provisions of the fifth amendment to the Constitution of the United States.

4. The second count is an indictment which contravenes Section nine (IX) of Article one (I) of the Constitution of the United States of America as being ex post facto.

P. F. Parrott, Attorney for Defendants.

In United States District Court

Motion for Separate Trial—Filed March 12, 1930

Now comes the defendant, Richard Husty, and moves the Court for an order for a separate trial herein upon the following ground:

1. That the evidence will show that the defendant Laurel fled from the scene of the arrest which would render such testimony highly prejudicial to the defendant, Husty.

P. F. Parrott, Attorney for Defendant, Richard Husty.

[fol. 10] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION TO SUPPRESS, ETC.—Entered March 12, 1930

Motions having heretofore been filed on the part of the defendants to suppress the evidence seized herein, and a further motion for finding of facts and law, and further motion to quash and a further motion for separate trial, and demurrer, all having been considered by the Court, It Is Ordered that said motions be and they are each hereby denied.

IN UNITED STATES DISTRICT COURT

VERDICT OF JURY—Rendered March 12, 1930

This cause being for trial and defendants present, the following jury was duly drawn and sworn, viz.: Arthur E. Wells, Carl A. Reyburn, Sidney L. Vaughn, Harold B. Carpenter, John Lake, Ora A. Porter, Archie Oliver, Peter Bauer, Andrew Larsen, Edward Rawlings, Edward Eriksen, and Ora A. Avery. The jury sat together in the jury seats and heard the proofs and allegations of the parties in part, whereupon counsel for the defendants, in the absence of the jury, renewed his motion to suppress the evidence seized herein and the Court, after hearing counsel for the respective parties thereon orders that said motion be denied, whereupon the jury, after resuming their seats, heard the conclusions of the proofs and allegations of the parties, the arguments of counsel and the charge of the Court, and retired from the bar thereof in charge of an officer of the Court duly sworn for that purpose, to consider of their verdict to be given and after being absent for a time return into Court and say upon their oaths that they find the defendants guilty in manner and form as the government have in their indictment in this cause alleged and complained against them.

In this cause, it is ordered by the Court now here that said defendants be remanded to the custody of the marshal [fol. 11] and that said defendant Richard Husty be released from custody on entering into a recognizance for appearance for sentence in the sum of $10,000.00, and that said defendant Charles Laurel be released from custody on entering into a recognizance for appearance for sentence in the sum of $2500.00.

In United States District Court

Sentence of Richard Husty—Entered on March 13, 1930

The defendant having been heretofore convicted and found guilty of the charges in said indictment contained and being now brought into Court and placed at the bar thereof, the Court now sentences him the said Richard Husty, to be imprisoned in the United States Penitentiary at Leavenworth, Kansas, subject to the rules and regulations of that institution, for and during the term and period of five years, from and including the 13th day of March, A. D. 1930; and that he pay to the United States a fine of Three Thousand Dollars ($3000.00), the United States to have execution thereof.

[fol. 12] In United States District Court

Sentence of Charles Laurel—Entered on March 13, 1930

The defendant having been heretofore convicted and found guilty of the charges in said indictment contained and being now brought into Court and placed at the bar thereof, the Court now sentences him the said Charles Laurel to be imprisoned in the United States Industrial Reformatory at Chillicothe, Ohio, subject to the rules and regulations of that institution, for and during the term and period of one year and six months, from and including the 13th day of March, A. D. 1930.

In United States District Court

Alternative Motion re Exceptions—Filed Mar. 14, 1930

To Honorable Fred M. Raymond, District Judge:

Now comes the defendants in the above entitled action and move the Court for an order incorporating into the record

of these proceedings the exceptions taken by counsel for the defendants at the time the defendant Richard Husty, one of the defendants herein, was sentenced by this Court and the reason stated by counsel for said exceptions and that said exceptions show the grounds stated by counsel at the time as being "that the sentence of the Court is excessive, based on a third conviction and that said excessive sentence is contrary to law and contravenes Section 9 of Article 1 of the Constitution of the United States of America."

And now come the defendants through their attorney and further move the Court that in the event the Court should overrule that part of this motion relating to counsel's exceptions to the sentence of the Court and the reasons given by counsel for said exceptions, that the Court permit and allow the contents of same to constitute and be an amendment to defendants' assignments of error and to be constituted [fol. 13] and be known as assignment No. 32 of the defendants' assignments of errors.

Counsel for the defendants move the Court that an order and finding upon the within motion be made with such despatch that the defendants, through their counsel, can perfect their appeal or error proceedings according to the provisions of the oath of the bond in this case made and provided.

Respectfully submitted.

P. F. Parrott, Attorney for Defendants.

Copy of motion received and notice that counsel will present same as soon as the Court's attention can be directed hereto.

L. H. Grettenberger, Asst. U. S. District Atty.

In United States District Court

Motion for New Trial.—Filed Mar. 13, 1930

Now comes the defendants and move the Court for a new trial in the above entitled action for the following reasons.

1. That the verdict of the jury is contrary to law.

2. That the verdict of the jury is not sustained by sufficient evidence.

3. For errors of law occurring at the trial.

4. That the trial court admitted prejudicial evidence over the objection of counsel for the defendants.

5. That the court permitted the evidence to be within the sight of the jury prior to the empaneling of the jury.

6. That the evidence was permitted to be and remain in the court room in the sight of the jury during the course of the trial.

[fol. 14] 7. For errors of law occurring at the trial.

8. That the verdict of the jury was not sustained by the evidence.

9. That the Government did not prove all of the material allegations of the indictment.

10. That the verdict of the jury should have been returned for the defendants.

11. Failure of the court to charge the jury as requested.

12. That the trial court admitted evidence and exhibits which were prejudicial to the defendants over the objections of counsel.

13. That the trial court admitted the exhibits in evidence while the identifying witness was still seated in the witness chair and before counsel had been given an opportunity of cross-examination.

14. That the trial court refused to grant the defendant Husty a separate trial, which was prejudicial to the defendant Husty.

15. For other errors occurring at the trial prejudicial to defendants and apparent upon the face of the record.

P. F. Parrott, Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT—
Filed Mar. 13, 1930

Now comes the defendants, through their attorney, and move the Court for a judgment of acquittal in favor of the defendants notwithstanding the verdict of the jury.

P. F. Parrott, Attorney for Defendants.

[fol. 15] IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR NEW TRIAL, ETC.—Entered March 13, 1930

Motion having been filed on the part of the defendants for a new trial and motion for non obstante veredicto, and the Court, after considering said motions orders that same be denied.

IN UNITED STATES DISTRICT COURT

CITATIONS OF ERROR—Filed Mar. 13, 1930

The defendants herein set out below the citations of error complained of as prejudicial to defendants upon the trial of the foregoing cause as being an invasion of the defendants' constitutional rights and an invasion of defendants' rights to a fair and impartial trial.

No. 1. That the trial court erred in overruling the defendants petition to suppress the evidence upon the motion of the attorney for the defendant at the conclusion of plaintiffs case upon the hearing of the petition to suppress the evidence, which was prejudicial to the defendants herein.

No. 2. That the court committed prejudicial error in overruling the motion of the attorney for the defendant to order a suppression of the order at the conclusion of the defendants case and after said matter was finally submitted to the court.

No. 3. That the trial court committed prejudicial error in overruling the demurrer of the defendants.

No. 4. That the trial court committed prejudicial error in overruling the defendants motion to quash.

No. 5. That the trial court committed prejudicial error in overruling the defendant Richard Husty's motion for separate trial.

No. 6. That the trial court committed prejudicial error in overruling the motion of defendant for finding of law and [fol. 16] of fact at the conclusion of and after judgment upon defendants petition to suppress the evidence.

No. 7. That the trial court erred in admitting any evidence to be introduced upon the trial of this cause over the objection of counsel for defendants, thus prejudicing the rights of defendants.'

No. 8. The trial court committed prejudicial error in overruling the motion of the defendants for a directed verdict at the close of the Government's case upon the merits.

No. 9. That the trial court committed prejudicial error in admitting into evidence over the objection of counsel for defendants the exhibits introduced by the plaintiff while the identifying witness was still seated in the witness chair and subject to cross-examination.

No. 10. That the trial court committed prejudicial error in overruling the motion of defendant to direct the jury to return a verdict for defendants.

No. 11. That the trial court committed prejudicial error in overruling the motion of defendant at the conclusion of the defendants' case.

No. 12. That the trial court committed prejudicial error in overruling the renewal of the motion of the defendants upon motion to quash.

No. 13. That the trial court committed prejudicial error on the overruling of the defendants' renewal of the demurrer filed herein.

No. 14. That the trial court committed prejudicial error in overruling the defendants in their requests to charge the jury after argument.

No. 15. That the court committed prejudicial error in making a rule that whatever requests to charge the jury that defendants attorney desired to make and have incorporated in the record as being overruled by the court, would have to be completed and in the hands of the official reporter before the jury returned with its verdict.

No. 16. That the court committed prejudicial error in not allowing defendants attorney a reasonable length to time to prepare and present his requests to charge the jury after argument.

No. 17. That the trial court committed prejudicial error by summarily overruling defendants requests to charge the jury before same were presented or submitted to the Court.

[fol. 21] IN UNITED STATES DISTRICT COURT

MOTION FOR SETTLEMENT OF BILL OF EXCEPTIONS—Filed April 3, 1930.

Now comes the defendants Richard Husty and Charles Laurel and moves the Court to settle the bill of exceptions herein with amendments as follows:

1. At the conclusion of the hearing on the petition to suppress on page 47 should be noted the overruling of said petition by the Court and the exceptions of the defendant thereto.

2. The transcript upon the trial on page two where the Court overrules three motions and grants counsel an exception a notation to be inserted that the motions referred to are Demurrer, Motion to Quash the Indictment and Motion for Separate Trial.

3. On page 3, at the top of the page, the language of my motion should be changed to read "and ask for a return of the goods, etc."

4. On page 21 of the record at the conclusion thereof should be set up the Court's Sentence with an exception saved for the defendants.

P. F. Parrott, Attorney for Defendants.

IN UNITED STATES DISTRICT COURT

ORDER DENYING MOTION FOR EXTENSION OF TIME TO SETTLE BILL OF EXCEPTIONS AND DENYING PROPOSED AMENDMENTS NOS. 1, 2 AND 4 AND ORDER GRANTING PROPOSED AMENDMENT NO. 3—Entered April 3, 1930

Motion having been made in this case for extension of time to settle bill of exceptions, the Court heard the arguments of counsel, whereupon it was ordered by the Court now here that said motion be and the same hereby is denied. [fol. 22] This matter coming on for hearing further upon motion of defendant- to settle bill of exceptions in certain proposed amendments, the Court heard the arguments of

counsel, whereupon it is ordered by the Court now here that proposed amendments Nos. 1, 2 and 4 be and the same hereby are denied, and that proposed amendment No. 3 be and the same hereby is granted.

IN UNITED STATES DISTRICT COURT

MOTION TO SETTLE, SIGN AND ALLOW BILL OF EXCEPTIONS—Filed April 4 1930

Now comes the defendant Richard Husty and moves the Court for an order settling the bill of exceptions herein as presented in narrative from and moves the Court to sign and allow the same as defendants' bill of exceptions herein.

P. F. Parrott, Attorney for Defendants.

To the United States District Attorney:

Please take Notice that the above motion will be presented before the Honorable Fred M. Raymond, district judge, on the 4th day of April, 1930, so soon as the Court's attention can be directed hereto.

P. F. Parrott, Attorney for Defendants.

Received copy of the above motion this 4th day of April, 1930.

L. H. Grettenberger, Assistant United States District Attorney.

[fol. 23] IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed April 4, 1930

ARTHUR Q. SCULLY, being first duly sworn by the clerk on behalf of the Government, on motion to suppress the evidence, testified as follows:

Mr. Parrott: I made request before lunch and we had a stipulation that you would arrange for a reporter in Court.

The Court: You will have to speak louder, this a very hard room to hear in.

Mr. Parrott: I want to know whether a reporter has been retained for the purpose of this proceeding.

The Court: The reporter is here now.

Mr. Parrott: I would like to have a full report of the proceedings, that was my inquiry, if that is understood——

The Court: The reporter is here taking the testimony now; so you need not have any concern on that subject.

Direct examination.

By Mr. Grettenberger:

My name is Arthur Q. Scully, and I am the deputy administrator for the Western District of Michigan, and was during December of this last year. I have been deputy administrator since December, 1926, and before that since 1920 I worked on the prohibition force, and have during that time been assigned to work in the Western District of Michigan. I have known Mr. Husty since 1922. My reason for knowing him at that time was I arrested him in 1922 for violation of the National Prohibition Act. He was transporting liquor at that time.

Q. And did you make any arrest of him for the violation of the prohibition law after that?

Mr. Parrott: I object to arrests, your Honor.

Q. Or any convictions?

Mr. Parrott: I object to convictions on the ground that the record is the best evidence.

The Court: I don't understand the question. Just read the question, Mr. Reporter.

(Question read as follows:) "Q. And did you make any arrest of him for the violation of the prohibition law after that, Or any convictions?"

The Court: I don't understand the question just read in a rational way. I think we had better have it withdrawn and a new question put.

[fol. 24] I came in contact with Mr. Husty after 1922 through my official position as agent or prohibition administrator. Mr. Husty was arrested again in 1928 for the violation of the liquor law.

Mr. Parrott: I move to strike the answer out as being based on hearsay.

By the United States Marshal of this court.

Mr. Parrott: I would like a ruling.
The Court: The answer will stand.
Mr. Parrott: Exception.

In my official position as prohibition administrator here I have learned what Mr. Husty has been doing between the time of 1922 to 1928 and since then.

Mr. Parrott: Objected to, if your Honor please, as being entirely immaterial on the question of illegal search; and hearsay. He must know. What he has learned—that implies that he learned it through hearsay. I object to the form of the question.
The Court: I will take the answer.

A. Yes, sir.

Mr. Parrott: I renew my objection.
The Court: The objection has been ruled on once, I think that is sufficient for your purpose. Proceed.

(Question read.)

I did, yes, sir. He has been a bootlegger, and so far as I know his activities have been confined to Grand Rapids in this Wes-ern District. I could not say whether or not he has been transporting liquor during that period. Around the 10th of December, 1929, I arrested defendants, Richard Husty and Charles Laurel, in this case, in the City of Grand Rapids, Michigan, on Jefferson Avenue, in the vicinity of Pleasant Street, about eight P. M., and I had information relative to him that night.

Q. What was the nature of your information?

Mr. Parrott: I object to it, if it is going to be hearsay.
The Court: Take the answer.

[fol. 25] I received information that Dick Husty had two loads of liquor parked in the vicinity of Pleasant and Jefferson; that a Graham-Paige coupe was parked on Jefferson just north of Pleasant, and that a Studebaker sedan was parked on Pleasant just east of Jefferson.

Mr. Parrott: I move the answer be stricken out.
The Court: The answer will stand.
Mr. Parrott: Exception.

Detailed information was given that the Graham-Paige car was about 150 feet from the corner of Pleasant Street, north, on Jefferson. It said the car had a load of liquor, in which there was no specific quantity specified. Then I went to this place after receiving that information and found such a Graham-Paige car, but did not find a Studebaker car. I do not know whether there was a car there. This Graham-Paige was located about 150 or 170 feet north from the corner of Pleasant Street on Jefferson. It was on the east side of the street. Mr. Husty was not there at that time, but he came later and Mr. Laurel and another man were with him. Mr. Husty got in behind the wheel, in the driver's seat, turned on his lights, started his motor, started to pull out in traffic, moved about a foot, and stopped. I stopped him. Laurel was in the car with Husty and another man. Laurel and the other man ran—The other man got away.

Mr. Parrott: I move to strike out what the other man did. He is not a party.
The Court: You will rise when you make an objection in this court, always please.
Mr. Parrott: Pardon me.
The Court: The objection will be overruled.
Mr. Parrott: Exception.

I looked for the liquor, I did not count the quantity of bottles there that night.

Mr. Parrott: I move to strike the answer out as not being responsive, if your Honor please.
The Court: Proceed.
Mr. Parrott: Exception.

After I stopped the car Mr. Husty stepped out of the car, stood alongside of the car. Mr. Laurel ran down Jefferson Avenue, and the other man went over to Pleasant [fol. 26] Street. 18 cases of whiskey was found in the car. When I stopped the car I believed the car contained a load of liquor.

Cross-examination.

By Mr. Parrott:

When I went to that automobile about eight o'clock that night I went there because I had a complaint or a tip, as you might call it, and that came to me by word of mouth from a reliable source, and I know that it came from a reliable source at that time. It came from a person in the community upon whose information I could act with prudence. He was not a business man or a bootlegger, but he has given me tips before, and I had acted upon them. I never found one that was not reliable. I have known him about eight years, and my association during eight years had not brought me entirely in direct contact with him, not often.

Q. How often had your contact been with the man from whom you received this complaint since 1922, the date of Mr. Husty's first conviction?

A. What do you mean by "contact"?

Q. I mean either by furnishing you so-called tips or meeting him socially or in a business way?

A. I could not tell you how often. I have seen the man, talked to him, received information from him on several occasions.

I cannot say how many times I have seen him since 1922 either in a business or social way; I might have seen him 500 times.

Q. Five times.

A. (Continuing:) I might be two hundred times out of the way on that.

Q. So when you acted upon his information at this time, it was not based upon a continuous social relation or business relation that you based your honest belief on to depend upon what he told you, is that right?

A. From my experience he usually told the truth.

From my experience he always told the truth, although from 1922 on I might have seen him 500 times. It did not always relate to the business of my office; I mean by that times I met the man on the street, times I was at his office and times he was at mine.

Mr. Grettenberger: I don't see how this is material on the direct examination.

Mr. Parrott: It goes to the——

[fol. 27] The Court: The answer may stand up to this point.

He did not come to my office the day he made this complaint and I did not go to his place. We just met casually. I talked to him over the telephone, in this case and then I later met him. I did meet him personally; it was personal contact. I met him after I talked to him over the phone.

Q. Did you not get this information from the sheriff——

Mr. Grettenberger: I object to that, your Honor, as being incompetent.

The Court: Objection sustained.

Mr. Parrott: If your Honor please, it might become competent, if we can prove later on as we expect to that it did come from a particular source, if I can connect it up; otherwise I will consent it go out.

The Court: The objection will be sustained.

Q. The information that this man gave you, did you inquire from him whether the information he was imparting to you was a matter of actual knowledge to him, or whether it came to him through hearsay?

Mr. Grettenberger: I object to that as incompetent——

Mr. Parrott: It directly follows the case of People v. Kamhout, where the court used that exact language.

The Court: That can be answered by "Yes" or "No." I will take the answer.

(Question read.)

A. Yes.

He did not tell me someone had phoned him.

Q. Did you ask him if he had personal knowledge of the things he was imparting information to you——?

Mr. Grettenberger: I object to that as being incompetent and immaterial.

The Court: It can be answered by "Yes" or "No." I will take the answer.

(Question read.)

Q. What was the answer?

[fol. 28] Mr. Grettenberger: I object to that as being incompetent on the ground——

The Court: I will take the answer.

A. That the liquor was in the car.

I asked him if he had seen it in the car. I am positive the car moved that night after Mr. Husty got in the car because I saw it move. I hadn't gotten out of my car. I was parked directly across the street from it. There were several others in the car with me. My car prior to the time their car started had not started to move across, toward them. Their car moved before I moved.

Q. Who was driving that car?

Mr. Grettenberger: I object to that as incompetent.

The Court: What does the question refer to. Who was driving the Husty car or the Scully car?

Mr. Parrott: I was talking about the Husty car.

The Court: I will take the answer.

A. Mr. Husty.

Q. You don't know whether Mr. Husty knew there was any liquor in the car at that time, do you?

Mr. Grettenberger: I object to that question as to what Mr. Husty knew; I don't see how it is competent, it is not germane to the direct examination; it does not seem to me it is material in this proceeding.

The Court: The question can be answered by "Yes" or "No"; I will take the answer.

A. No.

I didn't know that Husty knew that there was liquor in the car.

The Court: The question has been answered, I think.

There was one conviction in 1922 and one in 1928 in this court.

Q. Now since 1928 you say Mr. Husty has been bootlegging since 1928?

A. Not while he was in jail he was not, but he was a couple days after he got out.

He was bootlegging since he got out of jail. He was sentenced in 1928 to one year, and got out in 1929, in Novem-
[fol. 29] ber, and since then he has been bootlegging. I have arrested him since 1929. I arrested him in December, 1929. I mean in this case. I was prohibition agent from that time on stationed here at Grand Rapids, but I did not arrest him from 1922 until 1928, tried to, but——

From all my experience and the aggressive officer that I am, during those six years I had no evidence sufficient to arrest him. On the night of this raid, on the night of the seizure, I was not with Officer Bos of the Sheriff's Department on an exploratory searching party. I was not with Mr. Bos whereby he was to go with me on this seizure. He did not tell me that he had received this tip over the telephone and ask me to aid him. I had no talk with Mr. Bos at all until after I saw this car.

Q. Did you have any talk with Mr. Bos' Superior Officer, the Sheriff himself?

Mr. Grettenberger: I object to that as incompetent and immaterial.

The Court: Objection sustained.

Mr. Parrott: Exception.

Mr. Bos did not tell me that the Sheriff had told him to assist me in this search and seizure.

Mr. Grettenberger: At this time, your Honor, I ask that the testimony relative to the talk with Mr. Bos be stricken, not being competent, not germane to the direct examination, nor related to the issues.

The Court: I don't think there is any testimony that he talked with Mr. Bos. I think the testimony is all to the contrary.

Mr. Grettenberger: I ask that whatever testimony there is about that talk, be stricken as immaterial, not germane and incompetent.

The Court: I think it may stand.

Q. You searched five or six or seven other cars in that immediate vicinity that night, did you not?

Mr. Grettenberger: I object to that.

Mr. Parrott: Wait a minute, until I finish the question.

Mr. Grettenberger: I beg your pardon.

[fol. 30] It is not true that on the night of this seizure, at or about eight o'clock, that prior and subsequent to the seizure of this particular Graham-Paige car, my men and the Sheriff's deputies and his men under my orders and I searched all of six or seven cars in that immediate vicinity; that is the only car that we searched that night.

Q. You know a fellow by the name of Beecher that lived on Pleasant Street?

A. I do not.

Mr. Grettenberger: I object to that as incompetent.

The Court: It is incompetent, objection sustained.

Mr. Parrott: I didn't get the ruling. It is incompetent, you say?

The Court: It is incompetent, yes.

Mr. Parrott: Exception.

Q. Do you know Sterling Hubbard, Mr. Scully?

Mr. Grettenberger: I can't see how that is competent, it is not germane, it is entirely immaterial.

The Court: I will take the answer, because it calls simply for a "Yes" or "No" answer.

(Question read.)

A. No.

Q. For your information he lives at 354 Fulton Street, and had his car in that immediate vicinity that night, at eight o'clock.

Mr. Grettenberger: I object to that testimony, if your Honor please.

The Court: There is no question pending, so far as that is concerned. No question has been asked.

(Statement of Counsel read.)

Q. And whose car was also searched at that time, by the officers who accompanied you. I will ask you if you remember that occasion.

Mr. Grettenberger: I will object to that as being incompetent.

The Court: Objection sustained.

Mr. Parrott: Your Honor—may it please the court, my purpose was to prove the exploratory character of the search.

A. I knew it was whiskey.

Mr. Parrott: That is a pretty simple question to answer. Will you please read it, Mr. Reporter?

(Question read.)

Mr. Grettenberger: That is pretty indefinite.

The Court: The question is meaningless as read by the Reporter.

[fol. 33] I guess it was the shape, the general shape of the bottle, and from my experience with bottles in the past, whiskey bottles, that I identified these particular bottles as indicating to me, in my mind, that those I saw are the same kind of bottles that I saw before which had whiskey in them.

Q. Who was the party from whom you received the tip that the automobile that you searched was at a certain location where you found it that night?

Mr. Grettenberger: I object to that, it being an incompetent and improper question to ask.

The Court: Objection sustained.

Mr. Parrott: Exception.

Q. I believe in answer to a former question on cross-examination you said that the party from whom you got the information of the place where this automobile was to be and was later found by you, stated it was given to him through some one, am I correct?

Mr. Grettenberger: I object to that, that has not been asked at all, that kind of question was never answered.

Mr. Parrott: I think the record will show that.

Mr. Grettenberger: That question was never asked and never answered.

A. No, I don't remember that question.

Mr. Grettenberger: I object to that question as incompetent and improper, and I ask that the answer be stricken.

The Court: It has been answered.

Mr. Parrott: You say it is not in the record.

Mr. Grettenberger: I do.

Mr. Parrott: Then I want to put that question on cross-examination at this time. (No response.) Withdraw that.

Q. Did you ask the party that give you this tip as to where this automobile would be found that night with liquor in it, and later proved to be the car in question here, did you ask that party where they received their source of information?

Mr. Grettenberger: I object to that as being incompetent. [fol. 34] The Court: I think that has all been covered in your former examination of this witness.

Mr. Parrott: I want this in the record, your Honor.

The Court: I will sustain the objection.

Mr. Parrott: Exception. May I have the last question read, please?

(Question read.)

Q. Just one or two more questions. Did the party that made the complaint to you, or the tip-off as we called it before in this case, receive their information, upon which you acted—I will put it the other way. Withdraw the other question. Where did the party who told you about this particular car in question, upon which you searched that night and found this car in question, where did they receive their source of information, if you know?

Mr. Grettenberger: I object to that, that has all been gone over, in the first place; and in the second place it is incompetent and immaterial.

Mr. Parrott: I rely on the Carroll case.

The Court: I will sustain the objection.

Mr. Parrott: Exception.

Q. Was the tip that the man gave you that night upon which you acted, based on information furnished him by others?

Mr. Grettenberger: Just a moment, that has all been gone over.

Mr. Parrott: I want to be sure that the record is clear, if your Honor please, that is the only purpose of it.

The Court: I think it has already been covered. I will sustain the objection.

Mr. Parrott: Exception.

Q. Whether the source of information that you acted on that night, and on which you searched the car in question was based on information coming to you from an officer?

Mr. Grettenberger: I object to that, that has been covered, it is incompetent.

The Court: Sustain the objection.

Mr. Parrott: Exception.

[fol. 35] At the time of the search the defendant Husty or Laurel, prior to the time they entered the car, did not act in a suspicious manner, and they had not been guilty of a felony to my knowledge, and neither of them were fugitives from justice so far as I know.

Q. You were not looking for them, and your arrest at that time was predicated upon nothing except what you found in the car and the tip you had previous to the search?

A. On the information that I had, yes, I had not found anything in the car when I see Mr. Husty.

At the time he drove the car aside from the violation in this case he was not violating any city ordinance or state law that I know of. Since 1922 I have been watching the defendant Husty at his residence and immediate vicinity, intermittently, in my efforts to prosecute him for violations of the prohibition act.

Q. How often?

Mr. Grettenberger: I object to that as incompetent, irrelevant and immaterial, I don't see how it is material.

The Court: Objection sustained.

Mr. Parrot: We will show whether or not it was an exploratory search.

The Court: Objection sustained.

Mr. Parrott: Exception.

Q. Would you say that your attempts to arrest or investigate the defendant Husty was once a week or more?

Mr. Grettenberger: I object to that as being incompetent and immaterial.

The Court: Objection sustained.

Mr. Parrott: Exception.

Q. I will ask you if you or your deputies ever followed the cars of Mr. Husty or guests of Mr. Husty around his home?

Mr. Grettenberger: I object to that, as being incompetent and irrelevant.

The Court: Objection sustained.

Mr. Parrott: Exception.

Q. I will ask if you did not follow, you or your deputies the cars of Mr. Husty or his friends as they visited his [fol. 36] home, or went about this town with him, since he has gotten out of jail under the conviction of 1928.

Mr. Grettenberger: Just a moment, I object to that question as being an improper question, the contents of the question, as to following guests, or following Husty also, it is improper in that way. Then it is also incompetent and immaterial to the issue.

Mr. Parrott: It is competent for the purpose of showing that all of these searches were of an exploratory character.

The Court: The question involved here is the search of this car upon this particular occasion. I will sustain the objection.

Mr. Parrott: That is all, Mr. Scully.

Mr. Grettenberger: That is all.

Mr. Parrott: At this time I move the court to make a finding granting the petition to suppress the evidence upon the ground that the officer who made the arrest and search did not do so acting upon information received from sources apparently so reliable that a prudent and careful person, having due regard to the right of others would act thereon, nor did he have probable cause to believe that intoxicating liquor was at that time being unlawfully transported in the automobile in question, or in his presence.

And further, that the search was purely of an exploratory character, and based on information secured from

others, not credible persons in the community and known to him as such, such as a prudent person could and would rely and predicate said search upon, and again I move the court to dismiss the defendants and allow the petition to suppress.

The Court: The proofs are closed in this motion, as I understand it?

Mr. Grettenberger: We have no further proof.

Mr. Parrott: I would like a ruling on that and then I may have some proof.

The Court: Upon the record as it now stands, the motion must be denied, upon authority of the Carroll case and others.

Mr. Parrott: Yes, upon authority of the Carroll case? Exception.

I would like to call Mr. Bos.

[fol. 37] Charles Bos, being first duly sworn by the clerk on behalf of the defendants, testified as follows:

Mr. Parrott: Now, if your Honor please, I move that the Government proceed with the witness on direct examination.

Mr. Grettenberger: The Government proofs are closed.

Mr. Parrott: My theory is, if your Honor please, that we are put in the position of proving our defendant innocent under the Constitution, and I am making the motion——

The Court: Your request will be denied, and the motion overruled.

Mr. Parrott: Exception.

Examination by Mr. Parrott:

I am Charles Bos, Deputy Sheriff of Kent County, Michigan, and I am married and 27 years of age; I have lived in Kent County about ten years. I have had occasion at times to aid Mr. Scully in the enforcement of the prohibition laws in Kent County and surroundings.

Q On the 10th day of December, did you accompany him on a search in and about Kent County?

A. I did.

Q. What time did you go with him, what time did you start with him that day?

A. Why, I wouldn't say I started out with him.

Q. What time did you first see or hear from Mr. Scully on the 10th day of December, 1929?

Mr. Grettenberger: Just a moment, I object to that form of the question, "see" or "hear."

The Court: I will take the answer.

About 8:00 P. M. Mr. Scully didn't want us to help him. He was called.

Q. By whom?

Mr. Grettenberger: I object to that unless this witness saw or heard him called.

Mr. Parrott: That is not the question. That has been passed on by the Supreme Court.

Mr. Grettenberger: Let's find out first whether he knows about it, or whether it is hearsay.

The Court: You may inquire.

[fol. 38] By Grettenberger:

I was not present when he was called.

Mr. Parrott: I object to that, he has no right to cross-examine.

The Court: I have already granted him the privilege.

Mr. Parrott: All right, excuse me.

By Mr. Grettenberger:

Q. What you know about whether Mr. Scully was called was merely hearsay?

A. Yes, sir.

By Mr. Parrott:

Q. I did not ask you whether Mr. Scully was called, I asked you whether you was called, and how you happened to go with Mr. Scully that night. Can't you tell us, Mr. Bos?

A. Why, I was called.

Mr. Grettenberger: Your Honor, may I just ask one question.

The Court: I will take the answer to this question.

A. I received a telephone call that there was two loads of liquor coming in on 16, and later on we received a call that this liquor was already in Grand Rapids, and one load was on Jefferson Avenue, just north of Pleasant Street, and the other one was on Pleasant Street, east of Jefferson.

I received that over the telephone, but did not impart that information to Mr. Scully, and no one else imparted to him that information in my presence.

Q. Was it after a while verified to you that someone else had imparted that information that had been given to you?

Mr. Grettenberger: I object to that as incompetent.

The Court: Objection sustained.

Mr. Parrott: Exception.

Q. Do you know whether or not anybody acted upon that information that you secured over the phone?

Mr. Grettenberger: I object to that, it would be incompetent so far as this proceeding goes. The whole case hinges on that.

[fol. 39] The Court: The question can be answered "Yes" or "No."

A. Yes.

Mr. Grettenberger: I object to that question and ask that the answer be stricken.

Mr. Parrott: The question has been answered.

The Court: The question has been answered and the answer will stand.

Q. And what was it that verified to you that the information you secured over the phone had been acted upon?

Mr. Grettenberger: I object to that, that would be immaterial.

Mr. Parrott: How are we possibly going to rebut anything of that character, if we don't put the question in such a direct form that we can apprise the court of what is going on here. We can't certainly be deprived of our defense in this matter.

The Court: The objection will be sustained.
Mr. Parrott: Exception.

Q. On that information that you received over the phone, Mr. Bos, did you take it up with your superior officer, the Sheriff of Kent County?

Mr. Grettenberger: I object to that as being incompetent and immaterial to the issues here involved.
The Court: Objection sustained.
Mr. Parrott: Exception.

Q. In furtherance of your duties as Deputy Sheriff of Kent County, having received a tip that there was a violation of the liquor laws going to take place or had taken place in your jurisdiction, what did you do?

Mr. Grettenberger: I object to what his duties were or what his duties are. That has no bearing on the question of whether Mr. Scully had any right to search the car.
The Court: I don't see how it has any bearing on the question here involved.
Mr. Parrott: Can't you prove under the law the sequence of actions, that it got from him to Scully? Otherwise how [fol. 40] could anyone in any criminal case prove his defense?
The Court: I don't think the question you asked has any bearing upon the sequence which you say you are trying to establish.
Mr. Parrott: The sequence has got to come from its inception to its conclusion. It had its inception from this witness.
Mr. Grettenberger: That remains to be proven.
Mr. Parrott: I am certainly trying to prove it.
Mr. Grettenberger: Here he is asking him if he had the duty to call Scully or to verify that someone else called him, or if he notified his superior officer. I object to what his duties were.
Mr. Parrott: I said "in furtherance of his duties what did he do."
The Court: The objection will be sustained.
Mr. Parrott: Exception.

Q. After you received the phone call, what did you do?

Mr. Grettenberger: I object to that as being incompetent in this case.

The Court: I will take the answer.

After I received the phone call we went out on it, acted on it.

When I say, "we acted upon it," I mean two other deputies.

Q. What is their names?

Mr. Grettenberger: I object to that as being incompetent as to the issues involved in this case here, the question is whether Mr. Scully had a right to search that car, no relationship between this witness, if there are other officers working on that same car, that is another issue.

Mr. Parrott: My purpose, if your Honor please, is to prove that the reason of their starting to go out there on this complaint brought Mr. Scully there, really to aid them, but Mr. Scully being a Federal man he took full charge, and that is the sequence.

Mr. Grettenberger: I don't see how that has any bearing in this case.

The Court: I will sustain the objection.

Mr. Parrott: Exception.

[fol. 41] Q. You went out on that complaint yourself, didn't you, Mr. Bos?

A. With others.

Mr. Grettenberger: I object, that is incompetent——

The Court: It has already been covered. I can see no purpose of recovering a situation of that kind.

Q. And, of course, in the course of that investigation, acting upon that complaint you met Mr. Scully, did you not?

Mr. Grettenberger: I object to that as being incompetent whether he met Mr. Scully.

The Court: I will sustain the objection.

Mr. Parrott: You can answer that——

The Court: I will sustain the objection.

Mr. Parrott: I didn't know you had made a ruling. Exception.

Q. Did you see or aid Mr. Scully on the night of December 10, in the search of an automobile at or near the corner

of Pleasant Street on Jefferson Avenue, on the night of December 10th?

Mr. Grettenberger: I object to that as being incompetent and immaterial.

The Court: I will take the answer.

A. I did.

I talked with Mr. Scully that night about this search and seizure.

Q. What did you say to him and what did he say to you?

Mr. Grettenberger: May I ask just one question, your Honor? Was this before or after the search of the car?

Mr. Parrott: I object to this cross-examination at this time.

The Court: I will take the answer.

A. Well, both.

I talked with Mr. Scully not over three minutes before the search of this car, probably about three minutes in the vicinity of Jefferson and Pleasant street in an automobile. [fol. 42] Q. Did you point out to him where the automobile was on Pleasant Street based on what you had been told over the phone?

Mr. Grettenberger: I object to that as being incompetent and immaterial.

The Court: There is no testimony yet that he pointed out any automobile.

Mr. Parrott: I am asking if he did.

The Court: Read the question, Mr. Reporter.

(Question read.)

It is a double question, it will be stricken.

Mr. Parrott: I will withdraw the question and put it again.

Q. You were at that place at that time as the result of a phone call you had received earlier in the evening that the liquor had been reported to you as coming in on M-16, and later a phone call that it was now in the city of Grand Rapids, and on the east side of Pleasant Street?

Q. Do you know who the party was that phoned you that night, that afternoon?

Mr. Grettenberger: I object to that as being immaterial.
The Court: Objection sustained.
Mr. Parrott: Exception.

Q. Did you inquire as to who the party was that was phoning you and giving you this tip about that car?

Mr. Grettenberger. I object to that, Your Honor.
The Court: Same ruling.
Mr. Parrott: Exception. I want to save an exception to the one just previous to that, I forgot to except.

Q. Did you or not phone to Officer Scully after receiving this tip about this car, apprising him of what they had told you?

Mr. Grettenberger: I object to that as having been gone over, and incompetent.
[fol. 45] The Court: I think that is at least the third time that has been covered, and I will again sustain the objection. We won't waste any more time on that particular matter.
Mr. Parrott: Exception.

Q. You went to the scene of this search and seizure that night, did you not, based upon the information that you had received over the telephone that night?

Mr. Grettenberger: Just a moment, I object to that as being immaterial. I don't see how it bears on the right of Mr. Scully to search that car, what some one else did.
The Court: Objection sustained.
Mr. Parrott: Exception. That is all.
Mr. Grettenberger: That is all.
Mr. Parrott: I would like to recall Mr. Scully.
Mr. Grettenberger: Just a moment. Do you recall him as your own witness?
Mr. Parrott: That is true, we accept him as our witness.

Arthur Scully again on the stand.

Examination by Mr. Parrott:

Mr. Parrott: I just, if Your Honor please, I just want to clear up one or two questions. I am not certain whether

those questions have been covered. If they have, why all right.

Q. The tip that you received upon which you acted, and under which you made this seizure and search, and the subsequent arrest, I will ask you now whether that was based upon a tip or phone call that you received from the sheriff's department of Kent County, Michigan?

Mr. Grettenberger: I object to that as being incompetent.

The Court. Objection sustained.

Mr. Parrott: Exception.

Officer Bos who just testified did not call me on December 10th, and tell me he had received a tip over the phone with respect to this car in question, and I did not base my [fol. 46] arrest, nor my search and seizure of this car upon what officer Bos had told me.

Q. Or any one else in the sheriff's Department of Kent County, Michigan?

Mr. Grettenberger: I object to that as being incompetent.

The Court: Objection sustained.

Q. Just one more question. Did any member of the Sheriff's Department of Kent County, Michigan, apprise you or any of your assistants on December 10th that a car of liquor was coming in on M-16 and describing a Graham-Paige, the car in question here, and that upon that call you acted?

Mr. Grettenberger: I object to that as being incompetent, and has been gone over for a half a dozen times.

The Court: Objection sustained.

Mr. Parrott: Exception.

That is all, Your Honor.

Mr. Grettenberger: That is all.

The Court: Any further testimony?

Mr. Parrott: That is all on the part of the defense, if Your Honor please.

Mr. Grettenberger: Government rests.

Colloquy Between Court and Counsel

The Court: The testimony is closed. Do you wish to discuss this question?

Mr. Parrott: I wish to renew my motion, if Your Honor please, and I wish to add to my motion on the ground of the language used in the Carroll case, the syllabus at 16—I will withdraw that.

If Your Honor please, I add to my motion as a ground for my motion, the fact that the evidence shows that officer Scully at the time he was lifting up the coverlid, as he said according to the record, that he was not sure that the liquor was under there, but he verified it after he got the car back down to their property, where they made the search. I am using the language of a ruling case for this kind of cases. We are confident that the evidence in this case does not come at all within the province of the Carroll case, because if Your Honor please will notice, at 16, the syllabus of the Carroll case, that it was a sequence of actions upon which the reporter in that case predicate that part of the syllabus. What does he say?

[fol. 47] (Reading) "Officers engaged in patrolling—etc."

There is nothing in the record in this case, nor is it contended that Grand Rapids and its environs have been used to transport contraband liquor or that this car in question actually did go over any roads that the Court might see fit by reason of former convictions to conclude were places where contraband liquor was being hauled. It is not contended nor is it in the record that this case comes within the purview of this syllabus, although Counsel cites the Carroll case in support of his contention.

Here is some more of the sequence of actions, as stated in the syllabus: "—and which same car was tried to be used a short time before," and "it was a known source of liquor supply."

The record in this case is absolutely barren of any evidence as to where this liquor came from, who brought it here, except that Dick Husty got in the car after it was here, and it is immaterial that the officers were not looking for evidence at the time, and that the liquor was concealed. But all these conditions that I have just named were the conditions upon which the Court predicated its opinion, and upon which the reporter who write that syllabus naturally predicated that part of the syllabus. Counsel quotes that as his authority. Now I am going to quote Your Honor the law in this case, on the evidence in this case, and it is not the Circuit Court of Appeals' opinion, it is

that of the Chief Justice of the United States and his associates, the Supreme Court of the United States speaking: "Whenever a felony has been committed, either in the presence of an officer, or as to which the officer has a belief based on reasonable grounds--" Reasonable grounds, what are his reasonable grounds? He had a tip, he won't disclose it, he won't say, he won't give any evidence by which this Court or Counsel can decide in their own mind whether it was reliable. Does Court or Counsel have to depend purely upon what is in the mind of the witness, to verify his honest belief, or his honest intentions as to what constitutes "reasonable grounds"?

Can a witness override the Constitution of the United States, the Fourth Amendment? I believe Your Honor recognizes that is the paramount law of the land, and no man by his evidence can contravene its provisions. We stand here helpless, he simply comes and says he believes it, and he won't say why he believed it, he won't tell us the names of the parties from whom he received [fol. 48] it to know whether they constitute a reliable source to verify his belief. No, "I am bigger than the Constitution of the United States of America, and I can sit here and with utter abandon state that I have an honest belief, and you have no standard to measure me by."

But, If Your Honor please, the people who write the Constitution made an example of such people as that, and they said "We cannot allow you to over-ride the Constitution." How are we ever going to get justice, if we cannot get from a witness, after the Supreme Court has said it must be based on reasonable or honest belief, based on reasonable grounds? How are we going to measure that honest belief, if we cannot get any evidence from him as to the source of his information, to let us know whether the parties from whom he got it are of good repute or otherwise. Can he sit there and override the Fourth Amendment of the Constitution?

The Court: Of course, the witness did not refuse to give the name, the Court ruled that he should not give it, and as I understand it, that is the trend of all of the authorities. If you have any authorities to the contrary the Court may change its ruling, but up to the present time, I know of no such. The witness has not refused, the Court has declined to permit him to answer.

Mr. Parrott: I don't want the man's name, I want evidence in this case to show to the Court whether his honest belief which he claims to have is justified or not, that is my point. He merely says that he was justified, because he had been given a couple of complaints and he acted upon them. I don't think that is sufficient in this case. The Supreme Court has held that it is not sufficient, it has got to be an honest belief based on reasonable grounds. He did not have an honest belief when he went there, because he said when he got to the back of the car, he admitted he lifted up the coverlid of the compartment, and he was not sure then until he got back to the garage, and the record will show it. He cannot get down to the next floor of this building, in his office and ascertain whether there was liquor in that car. Your Honor is no doubt perfectly familiar with cases, not only in Michigan, but other cases as reported in the reports. Now here is the Kamhout case, coming right in the State of Michigan. What do they say in that case as to what is the law of the land, and the law of the State of Michigan? An officer acting upon information apparently so reliable that a prudent and careful person having due regard for the rights of others; and Dick Husty, having expiated his for-
[fol. 49] mer crimes, had as good a right to expect to be safeguarded with respect to his person and property as any one else, the law looks upon him as having expiated his crimes—(citing) "having due regard for the rights of others, would act thereon, they have reasonable and probable cause to believe that intoxicating liquor is being unlawfully transported in an automobile in their presence," then an officer may arrest the offender and search for contraband liquor.

Now that is a Michigan case.

I wish, Your Honor, before passing on this question—Your Honor is no doubt familiar with the Render (?) case, if Your Honor would just look over the syllabus in that case before deciding.

The Court: You may give me the citation of the cases upon which you rely, and I am perfectly willing to review them.

(Mr. Parrott here cites cases.)

The Court: I will dispose of this motion sometime today or tomorrow. The Court will take a recess.

Grand Rapids, Michigan, March 12, 1930.

Appearances: Mr. Fred Wetmore, United States District Attorney, and Mr. Louis H. Grettenberger, Assistant U. S. District Attorney, on behalf of the Government: Mr. Percy Parrott, Attorney on behalf of Respondents.

The Court: In the case of United States vs. Richard Husty and Charles Laurel, Respondents, are the parties ready?

Mr. Grettenberger: Government's ready.

Mr. Parrott: Yes, Your Honor.

The Court: Are both respondents in the Court room?

Mr. Parrott: One of them is present. Mr. Husty went out to bring a witness down who had no other way of getting down here quickly.

The Court: Do not proceed with calling the jury.

(After a few minutes Respondent Richard Husty entered the Court room.)

The Court: Mr. Clerk, you may call the Jury.

Mr. Parrott: If Your Honor please, might I interrupt? I have filed three motions: can we dispose of them before the jury is called?

The Court: I have read the three motions, and each will be denied. You may have an exception.

[fol. 50] Mr. Parrott: I want an exception.

The Court: You may have an exception as to each.

(Jury called.) (Jury sworn on first oath.)

Mr. Grettenberger: May it please the Court, and gentlemen of the jury: This case involves the violation of the National Prohibition Act by one Richard Husty and Charles Laurel. Mr. Richard Husty is from Grand Rapids, Charles Laurel I believe is from Detroit, or the vicinity of Detroit. Are there any members of this jury that are acquainted with Mr. Husty?

(Jury examined further.)

(Jurors examined by Counsel for Respondents.)

Mr. Grettenberger: Government is satisfied with the jury.

Mr. Parrott: If Your Honor please, we are satisfied for cause and peremptorily.

The Court: Mr. Clerk, you may swear the jury.

(Jury sworn.)

The Court: Mr. Grettenberger, I presume this case will require the remainder of this afternoon?

Mr. Grettenberger: I believe so, Your Honor.

OPENING STATEMENT BY MR. GRETTENBERGER

May it please the Court——

Mr. Parrott: If Your Honor please, may I, at this time, for the purpose of the record, renew my motion on my petition to suppress? I also wish to object to any introduction of the testimony, and ask for the return of the goods found, by reason of their inadmissibility.

The Court: The record will so show, and the motion will be overruled, and you may have an exception.

Mr. Parrott: Thank you.

If the Court please, I would like to have the record show that I renew my motion at this time for a separate trial of these defendants.

The Court: The motion will be denied.

Mr. Parrott: Exception.

The Court: You may have an exception.

By Mr. Grettenberger: May it please the Court, and gentlemen of the jury, as I stated briefly before examining you, this case involves the violation of the National Prohibition Act as amended. The indictment returned by the grand jury in this case contains two counts, Count 1 is a transportation count, and sets up that on the 10th day of December 1929 in the City of Grand Rapids in this County, County of Kent, these Respondents transported in an auto- [fol. 51] mobile, a Graham Paige coupe, a certain amount of spirituous liquor, to wit: Whiskey.

Count 2 is a possession count, which alleges that on the same day these respondents possessed in the City of Grand Rapids whiskey, and in addition to the possession of this whiskey it is alleged in this indictment that it is the third offense against one of the Respondents, Richard Husty. The Government will introduce evidence in this case on the two counts, from which it will be shown that on this 10th day of December, 1929, these two respondents in the City

of Grand Rapids, over the highways of the city of Grand Rapids were transporting and were possessing intoxicating liquor, namely whiskey.

The Government calls as its first witness Mr. Scully.

ARTHUR Q. SCULLY, being first duly sworn by the Clerk of the Court, on behalf of the Government, testified as follows:

Direct examination.

By Mr. Grettenberger:

I am the Deputy Prohibition Administrator for this District and have been such since 1926. I had occasion to make the arrest of Respondents Richard Husty and Mr. Laurel in this case on December 10th, 1929, at about 8 P. M., that was in the evening. They were in the vicinity of Jefferson Avenue and Pleasant Street in this city, southeast, when I arrested them; they were in a Graham-Paige coupe at the time I arrested them.

Q. And what else, if anything?

Mr. Parrott: Objection, he has not indicated anything else.

The Graham-Paige coupe was parked on the east side of Jefferson Avenue, about 150 feet from Pleasant Street, north.

Q. And where were these two men?

Mr. Parrott: Objection; at what time, if Your Honor please?

At the time I arrested Mr. Laurel he had got out of the automobile and ran into an alley. Mr. Husty was arrested right at the car; he was sitting behind the wheel just stepping out, I think. I saw them get into the automobile pre- [fol. 52] vious to my arresting them. After they got into the automobile, Mr. Husty got in behind the driver's wheel, Mr. Laurel also got in the seat, it was only a one-seat coupe; there was also a third man; Mr. Husty started the motor and started to pull out into traffic or on to the street and just as he started to move, I imagine he moved his car about two or three feet, a very short space, I pulled the Government car over in front of him and stopped him.

After I stopped them, Mr. Laurel and the other man got out of the Graham-Paige and ran. I looked in the car at that time, I did not make a thorough search at that time, that is, I did not count the liquor, I found something in the car, and noticed that it was a quantity of whiskey. I later searched more thoroughly for the amount of whiskey, which was eighteen cases and one quart. These little cars filled with bags full of something, and these bottles, are the liquor that was taken from this automobile.

(Bottle handed up, marked on label Gov. Exh. A.)

Q. What kind of liquor did you find there in the car?

Mr. Parrott: Objected to; he is not qualified.
The Court: You may inquire if he knows.

I know what kind of liquor I found there in the car and it was a Canadian liquor; whiskey. Government Exhibit A is one of the bottles I found, and I have examined the contents in this car here, this No. 1 here, I have examined every particular bottle. I have gone through to find out and it is all whiskey, and also the same contained in these sacks. After having made the arrest of Mr. Husty, I searched his person.

Q. What did you find if anything?

Mr. Parrott: That is objected to.
The Court: I will take the answer.
Mr. Parrott: Exception.

I found $960.00 in cash and two checks and that is about all that I can recall.

Mr. Parrott: I move to strike the answer out.
The Court: The answer will stand.
Mr. Parrott: Exception.

I made inquiries from Mr. Husty as to what he was going to do with that money.

[fol. 53] Q. What did he say?

Mr. Parrott: Objection, Your Honor.

A. Mr. Husty——

The Court: I will take the answer.
Mr. Parrott: Exception please.

Mr. Husty refused to make any statement regarding the money, and made no statement at all other than his age and the regular statement for the report of the case. Mr. Laurel made some statements to me and told me that he did not know or had not known Mr. Husty till the afternoon of that day, that he came over from Detroit in this car that was seized, that Graham-Paige; that he did not know the liquor was in the car, and that he didn't know who the man was — escaped, but that man was the same man that came over from Detroit with him. Mr. Laurel was the one that tried to escape that night.

Mr. Grettenberger: At this time I would like to offer in evidence Government Exhibit A, and all this liquor here in these two cars, which Mr. Scully has described as being that which he found in the car in question.

The Court: It will be received.

Mr. Parrott: May the record show that it is all objected to, and objected to because the witness is still on the stand.

Mr. Grettenberger: You may take the witness.

Mr. Parrott: No cross-examination.

Ray W. Harring, being first duly sworn by the Clerk, on behalf of the Government, testified as follows:

Direct examination.

By Mr. Grettenberger:

During December of this year part of the time I was in Grand Rapids, and my business during that month was that of a prohibition agent. Previous to December 10th I had been such approximately two years. I was present the night that Mr. Scully made the arrest of Mr. Husty and Mr. Laurel. I saw Mr. Laurel on that night in the alley, about 25 feet from the car, the Graham-Paige car, at the head of the alley. Mr. Husty was behind the wheel, just getting out of the Graham-Paige. About ten minutes [fol. 54] after I saw Mr. Husty at the car I noticed they had something in that car that night. This evidence here

predicated, according to this evidence entirely upon what they found in the automobile after search.

The Court: Your motion then, as I understand it, is substantially a renewal of the motion that you made yesterday?

Mr. Parrott: With the variations that I have just given.

The Court: Your motion will be denied, and you may have an exception.

Mr. Parrott: Exception.

The Court: You may proceed with the opening statement.

Mr. Parrott: May I have just a minute, Your Honor, to decide upon the policy? (After a short pause in the proceedings.) I would like to call Mr. Scully.

Mr. Grettenberger: You are calling him as your witness?

Mr. Parrott: I am calling him as my witness, but by virtue of him being a government witness and necessarily adverse, I want the privilege to cross-examine.

Mr. Grettenberger: I object to it, and I think it is an improper way of calling a witness. He should call him as his own witness.

The Court: I think he has announced that he is calling him as his own witness, and Mr. Scully will take the stand.

Arthur Q. Scully recalled to the stand.

Examination by Mr. Parrott:

I testified in this case before on a petition to suppress the evidence.

Q. And when you searched this car, will you tell us whether you searched it with a search warrant?

Mr. Grettenberger: I object to that as being incompetent, immaterial at this time.

The Court: Objection sustained.

Mr. Parrott: Exception.

[fol. 57] Q. By virtue of what did you search the car in which you found the liquor is in evidence.

Mr. Grettenberger: I object to that as calling for an answer on the same ground as the question to which objection has already been sustained.

The Court: Objection sustained.

Q. Did you search this car and secure this liquor, Mr. Scully, after you had received a tip-off through your office?

Mr. Grettenberger: I object to that as incompetent and immaterial.

The Court: I think I shall sustain the objection. I think I shall say to the jury that under the law that has prevailed in this Court for a number of years, the question of the legality or illegality of searches is a question for determination by the Court at some time prior to the actual commencing of the trial. It is law that is well understood and is well settled, and the question of the legality of this search was brought before the Court for hearing yesterday, testimony taken on both sides, and the question fully disposed of.

I am saying that to you so you will understand why the Court rules as it does. The question has been disposed of in the usual and regular and only proper way it could be disposed of, and further questions along that line, of course, will be improper.

Mr. Parrott: Exception.

That is all, Mr. Scully.

The Court: The Court will take a recess for ten minutes.

(Recess of approximately ten minutes was had at this time.)

Mr. Parrott: If Your Honor please, the defense will rest at this time.

The Court: Defense rests?

Mr. Parrott: Defense rests.

Mr. Grettenberger: We rest.

The Court: How long a time do you wish for argument in this case?

Mr. Grettenberger: About five minutes, Your Honor, I think.

The Court: Will five minutes on each side be sufficient?

[fol. 58] Mr. Parrott: That is sufficient.

The Court: You may proceed.

(Argument by Mr. Grettenberger, and argument by Mr. Parrott, rebuttal argument by Mr. Grettenberger.)

Mr. Parott: If the Court please, I would like the record to show that the last statement of counsel is prejudicial.

CHARGE TO JURY

The Court: Gentlemen of the Jury: It is an offense against the laws of the United States to transport upon the streets or highways of the city of Grand Rapids, or of the State of Michigan, or any of the streets or highways of the country, intoxicating liquor. It is also an offense against the laws of the United States to possess intoxicating liquor. The indictment returned by the Grand Jury in this case contains two counts, the first count of which charges that on or about the 10th day of December, 1929, at the city of Grand Rapids these Respondents, Richard Husty and Charles Laurel did unlawfully transport over and upon the public highways of the County of Kent, and the streets of the city of Grand Rapids, — an automobile, to wit, a Graham-Paige coupe, certain intoxicating liquor, namely whiskey, which liquor then and there contained one-half of one per cent and more of alcohol by volume. The second count of the indictment is what is called a possession count, and in that count these respondents are charged on the same date with the unlawful possession of intoxicating liquor, namely whiskey, and it is also charged in the second count that this offense constitutes a third offense, so far as the Respondent Richard Husty is concerned.

So it is the claim of the Government that these Respondents have violated in two particulars the laws of the United States.

Now the law presumes these Respondents to be innocent of the offenses charged against them in this indictment and throws around them the protection of that presumption, and the burden rests upon the Government to establish by evidence and beyond a reasonable doubt each and every essential element of the offenses charged against the Respondents and to negative each and every reasonable hypothesis of their innocence. This burden remains upon the Government throughout the case, and there is no burden resting upon Respondents to establish their innocence. It will be your duty as jurors to commence your deliberations with the presumption of their innocence uppermost in your [fol. 59] minds, and to continue your deliberations with

that presumption uppermost in your minds until you become convinced of their guilt by the evidence in the case and beyond a reasonable doubt.

By a reasonable doubt is meant exactly what the term implies, namely, a doubt for which there is a reason. The reasonable doubt which will prevent a juror from voting for conviction is and it must be a real and a substantial doubt as distinguished from a merely possible or imaginary one; it must be a fair and an honest doubt, as distinguished from a merely captious or capricious one; it must be a doubt which grows out of the evidence in the case, and is based upon reason and common sense, and not a doubt which grows out of or is based upon bias, or prejudice or sympathy. If any juror has such a reasonable doubt as to the guilt of these Respondents, he will have no right to vote for conviction; on the other hand, no juror has the right arbitrarily and without reason to say that he has such a doubt and thereupon refuse to convict. If you have such a reasonable doubt as to the guilt of Respondents, it will be your duty to acquit them; on the other hand, if you have no such reasonable doubt it will be equally your duty to convict them.

I think it will be unnecessary for the court to review the claims of the parties in this case. It is sufficiently stated in the indictment, and in that connection I shall say that by the plea of not guilty which has been entered in this Court by the Respondents, they, of course, deny their guilt of the offenses charged.

I may say that if you find from the evidence of the case beyond a reasonable doubt as I have defined it, that the Respondents were knowingly transporting liquor upon the streets of the City of Grand Rapids, it would then be your duty to convict. I should perhaps say with reference to Respondent Laurel, that it does not appear that he was actually at the steering wheel; the car, it appears from the evidence was being driven by Respondent Richard Husty. In that connection I shall call your attention to Section 332 of the Criminal Code of the United States, which provides as follows: "Whoever directly commits any act, constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal." In other words, if you find from the evidence in this case that the Respondent Charles Laurel

was aiding and assisting knowingly in the transportation of intoxicating liquor, you will be justified, provided you [fol. 60] find that fact to be true beyond a reasonable doubt, as I have defined it, you will be justified then in finding Charles Laurel guilty of the offense charged.

There has been some evidence in this case of an attempted flight upon the part of Charles Laurel. Flight in and of itself is not conclusive evidence of guilt. It is, however, a fact which the jury has the right to weigh and consider in connection with all of the evidence of the case as indicating a consciousness of guilt.

Now you are the sole judges of the credibility of the witnesses, it is for you to determine who has told the truth. You will give to the testimony of each witness such weight and credence as you believe it is entitled to, and in weighing and measuring the testimony of each and every witness you have a right to take into consideration his appearance upon the witness stand, the reasonableness of the story which he has told, take into consideration any motive which he may have had for testifying falsely, and any interest which he may have in this prosecution or its outcome. It will then be your duty to determine the testimony which is true and that which is untrue, and when you have made that determination you will discard and disregard the testimony which you find to be untrue and reach a verdict based upon all the evidence in the case which, under all the circumstances, you believe to be true.

Now these Respondents are here on trial upon two separate and distinct charges, what are known as two separate counts in the indictment. You will have the right to convict the Respondents upon both counts of the indictment, or to acquit upon both counts of the indictment, or to convict upon one count of the indictment and acquit upon the other counts, depending upon your view of the testimony. You have the right, of course, to acquit either of the Respondents upon either of the counts, and to convict either of the Respondents upon either of the counts, as you view the testimony.

If you convict the Respondents upon both of the counts in the indictment, that is, if you convict both of the Respondents upon both of the counts of the indictment your verdict will be "We find Respondents guilty as charged."

If you acquit Respondents upon both of the counts in the indictment, your verdict will be "We find Respondents not guilty." If you convict the Respondents upon one count of the indictment and acquit upon the other, you will indicate by your verdict the count upon which you convict and the count upon which you acquit, bearing in mind that Count 1 [fol. 61] of the indictment charges the offense of unlawful transportation, and Count 2 of the indictment the offense of unlawful possession. Of course, if you convict one of the Respondents and acquit the other upon either of the counts, you will so indicate by your verdict, naming the Respondent convicted and the Respondent acquitted, as well as the count or counts upon which you acquit or convict.

Mr. Clerk, you may swear an officer.

Mr. Parrott: If Your Honor please, I would like to have one or two things charged to the jury if I may, before they retire.

The Court: I think the officer may be sworn, and after the jury has retired, if you wish to take exceptions to the charge, the Court will consider your requests and recall the jury for further instructions, if they are well taken.

You may swear an officer.

(Officer sworn.)

REQUESTS TO CHARGE

Mr. Parrott: Exceptions generally.

I request the Court to charge: "If you find from the evidence that the arresting officer made the search of the automobile in which the liquor was found without a warrant, and if you also do not find from the evidence that the arresting officer from the exercise of his own senses, or acting upon information received from sources apparently so reliable that a prudent and careful person, having due regard to the rights of others would act thereon, and has reasonable and probable cause to believe that intoxicating liquor is being unlawfully transported in this particular automobile in his presence, then you will return a verdict for the defendants."

I request that the Court direct the jury to return a verdict for the defendants on the ground that they have not been proven guilty beyond a reasonable doubt.

I think that is all.

The Court: The Court will take a recess.

(Recess period.)

(In the absence of the Court, and in the absence of the Jury, the following request was dictated by Counsel for Respondents:

"If you find from the evidence that the arresting officer discovered the liquor after the arrest, and did not—if you do not further find from the evidence that the arresting officer from the exercise of his own senses or acting upon information received from sources apparently so reliable that a prudent and careful person having due regard to the [fol. 62] rights of others would act thereon, and had reasonable and probable cause to believe that intoxicating liquor was being unlawfully transported in an automobile in his presence, then your verdict will be for the defendants."

(At this point the jury returned to the Court room, before the last request could be brought to the attention of the Court.)

(Foreman, upon inquiry from the Clerk, announced verdict of "Both Respondents guilty on both counts.")

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Grettenberger: May it please the Court, may Respondents be remanded in the custody of the Marshal?

The Court: Yes, Respondents will be remanded to the custody of the Marshal.

The Court will take a recess at this time.

(Recess.)

(During recess the final request of Counsel for Defendants was read to the Court.)

The Court: The Jury was in the Court room, of course, before the Court was informed of that request? I think the record should show that the request was dictated in the absence of the Court, during recess, and in the absence of the jury.

Proceedings of March 14, 1930—2:30 p. m.

Mr. Parrott: May I be heard at this time?

The Court: Yes, you may proceed.

Mr. Parrott: This motion is filed, if Your Honor please, by reason of the fact that the Reporter was not present last evening when I took exception to the Court's sentence of the Defendants Husty and Laurel. I believe without any further argument upon this phase the motion should be granted.

Mr. Grettenberger: What motion do you have reference to?

Mr. Parrott: The motion which I have handed to the Court, the motion with reference to granting counsel exceptions to the Court's sentencing, and to the penalty of the sentence, and I want it to appear as a matter of record that an exception is taken in the language contained in the motion.

The Court: I shall have to say that I don't remember that particular exception having been made after the imposition of sentence. I might not have heard just what was going on, do you recall, Mr. Grettenberger?

Mr. Grettenberger: My best judgment is that the whole exception that he now has indicated in his petition or mo-[fol. 63] tion was not made at the time. I recall no such language. That is my impression also.

Mr. Parrott: If Your Honor please, that is more or less correct. Your Honor stopped counsel. We discussed the question somewhat of why the reporter was not here, and I was rather estopped from asserting the latter part of my exceptions by reason of that fact. I would have included that all, if the Court had not entered into the discussion as to why I did not have my reporter here.

The Court: I suggested to you, I think at six o'clock last night that you should, of course, have a reporter here, if you desired to note exceptions. I think that was the language that took place at that time. It probably was too late at that time to procure a reporter.

Mr. Parrott: I thought I had a right to assume that he would stay as long as matters were before the court.

The Court: This other situation, I think, is conclusive upon the matter of a motion, that is that I think this court loses all control over the case when once appeal is allowed.

Mr. Parrott: On the alternative part of it I think that is correct.

The Court: I think I shall deny the motion.

Mr. Parrott: Does Your Honor deny both sections?

The Court: Yes.

Mr. Parrott: Exceptions please.

The Court: You may have your exceptions.

Mr. Parrott: Exception as to both grounds made in the motion and for all reasons therein alleged.

The Court: The Court will take a recess at this time.

(Recess period.)

(During Recess period and in the absence of the Court, and of counsel for the Government, Mr. Parrott, Attorney for Respondents dictated the following on the record: "You have it where I made reference to my three motions, before the trial? I want the record to show that they were a demurrer, motion to quash, and motion for separate trial. I mentioned the motion for separate trial later in the case. Just indicate on the record that the three motions referred to were demurrer, motion to quash, and a motion for separate trial.")

[fol. 64] IN UNITED STATES DISTRICT COURT

ORDER SETTLING BILL OF EXCEPTIONS

The exceptions taken upon said trial are hereby settled at the request of Counsel for defendant by the consent of the District Attorney, which contains the substance of all the testimony given upon said trial which in any manner affected the exceptions herein noted in so far as the testimony set out by questions and answers it is done because I deem it necessary for a full understanding of the questions raised by this appeal.

Dated this 4th day of April, A. D. 1930.

Fred M. Raymond, District Judge.

O. K. L. H. Grettenberger, Assistant United States District Attorney. P. F. Parrott, Attorney for Respondent.

Filed April 4th, A. D. 1930.

In United States District Court

Præcipe for Transcript of Record—Filed March 29, 1930

To the Clerk:

Please prepare transcript of record in the above entitled cause for the United States Circuit Court of Appeals and include therein the following papers and orders:

Indictment.
Plea of Defendant, Richard Husty.
Plea of Defendant, Charles Laurel.
Petition to Suppress and Return Evidence.
Rule to Show Cause upon Petition to Suppress and Return Evidence.
[fol. 65] Finding of the Court upon Petition to Suppress and Return Evidence, and order denying.
Demurrer.
Motion to Quash.
Motion for a Separate Trial.
Verdict of the Jury.
Sentence of the Court.
Alternative Motion.
Motion for a New Trial.
Assignment of Errors.
Petition for Appeal.
Order allowing Appeal.
Bond on Appeal.
Citation.
Bill of Exceptions on Petition to Suppress and Return evidence, and upon trial.
Motion for judgment non obstante veredicto.
Motion for Settlement Bill of Exceptions.
Order denying motion in part.
Application for a Settlement of Bill of Exceptions.
Certificate of the Clerk Authenticating the Record and Designation of Contents of Record.

P. F. Parrott, Attorney for Richard Husty and Charles Laurel.

[fol. 66] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 67] Appearances of counsel omitted in printing.

Minute entry of argument and submission June 11, 1930, omitted in printing.

[fol. 68] IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

JUDGMENT—Filed June 28, 1930

It appearing (1) that the search was reasonable and the motion to suppress properly denied; (2) that the indictment was good and that it was not necessary to make reference therein to the so-called Jones Law; (3) that it was proper upon the trial to exclude evidence as to the reasons for the search,—that subject matter having been foreclosed by the decision of the motion to suppress; (4) that the sentence was supported by conviction on the second count; (5) and that the other errors alleged are not well taken—

Ordered that the judgment and sentence of the court below as to each appellant be and is hereby affirmed. Let the mandate issue forthwith.

Clerk's certificate to foregoing transcript omitted in printing.

[fol. 69] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed November 24, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,399. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 477. Richard Husty and Charles Laurel, petitioners, vs. United States of America. Petition for a writ of certiorari and exhibit thereto. Filed September 26, 1930. File No. 35,399.

FILE COPY

Office Supreme Court, U. S.
FILED
SEP 26 1930
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

No. 477

RICHARD HUSTY, AND CHARLES LAUREL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SITXH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

JOHN B. McMAHON,
PERCY F. PARROTT,
HAROLD A. KESLER,
Solicitors for Petitioners

IN THE

Supreme Court of the United States

No.....

RICHARD HUSTY, AND CHARLES LAUREL,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SITXH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

JOHN B. McMAHON,
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HAROLD A. KESLER,
Solicitors for Petitioners

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IN THE

Supreme Court of the United States

No.....

RICHARD HUSTY, AND CHARLES LAUREL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SITXH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

TO THE HONORABLE SUPREME COURT OF THE UNITED STATESS

The petitioners respectfully show the Court that in the March term, A. D. 1930, of the District Court of the United States, Western District of Michigan, Southern Division, they were indicted for violation of the National Prohibition Act, as amended, on two counts: first, for transportation; and second, for possession; the latter count averring the conviction of Richard Husty in November, 1922, and in April, 1928, for unlawful possession.

Both petitioners were convicted on both counts and Richard Husty was sentenced for a term of five years, and fined Three Thousand Dollars, ($3,000.00), and Charles Laurel was sentenced for one year and six

months; both sentences having been imposed apparently under the Jones Act, so-called.

These convictions and judgments were reviewed by the United States Circuit Court of Appeals of the Sixth Circuit, Case No. 5660, and the judgments and sentences of the trial court were affirmed without opinion, by the said court, and in its order, found as follows:

> "(1) that the search was reasonable and the motion to suppress properly denied; (2) *that the indictment was good and that it was not necessary to make reference therein to the so-called Jones Law;* (3) that it was proper upon the trial to exclude evidence as to the reasons for the search, that subject matter having been foreclosed by the decision of the motion to suppress; (4) *that the sentence was supported by conviction on the second count;* (5) and that the other errors alleged are not well taken." (Italics ours.)

Throughout the proceedings in the District Court the petitioners saved exceptions to adverse rulings on: (1) petition to suppress evidence, i. e. the liquor seized; (2) *demurrer;* (3) *motion to quash;* (14) motion for separate trial; (5) *motion to direct verdict at conclusion of the governments case;* (6) motion to direct at conclusion of all the evidence; (7) *motion for new trial;* (8) admission and rejection of evidence and requests to, and objections to, the charge, *and on the sentence.*

Proper exceptions were also saved to the rulings of the Circuit Court of Appeals.

Your petitioners show, that the record in this case discloses, that Husty was fined for possession in 1922 and 1928; and, although he was under more or less constant surveillance at all times since 1922, the government officers were unable to discover any sales or at-

tempts to commercialize violations of the law, unless these two isolated arrests for possession are so considered.

There is no claim that Laurel was ever in custody before for any violation of any character.

Both petitioners were sentenced as if in the class of habitual sellers, and as persons who attempt to commercialize violations of the law, over proper objection on the part of Husty, yet there appears no evidence of sales or commercialization in the record.

It is also shown that if the two previous arrests of Husty are considered, as they evidently were by the lower courts, they happened before the Jones Law became effective.

Your petitioners show this to be a case of great public importance because the prosecution was under the Jones Law and involves:

1. The rights, duties, and responsibilities of government officers in making arrests without warrants—and consequent searches and seizures—of automobiles, where it is uncertain, under this law, whether the offense is a felony or misdemeanor until the case has been tried. The rights to arrest without warrant are manifestly different in the two cases.

2. Whether the indictment must show a charge for misdemeanor or felony under this act or violate Amendment VI.

3. Whether at the trial the Government must establish beyond a reasonable doubt, habitual sales or attempts to commercialize, and whether this is properly a jury question within Amendment VI.

4. Whether, any counts in same indictment of previous convictions, for possession, can be considered

properly in the determination of the sentence as a misdemeanor or felony.

5. Whether convictions for possession prior to the effective date of the Jones Law should be considered.

6. Whether the question of slight or casual violations is entirely within the discretion of the court, without limitation, and what constitutes an abuse of same, and if this is cruel and unusual punishment.

That there is more or less conflict of authority in the decisions of the District Courts and the Circuit Courts of Appeal, and many of these important matters are now left undecided in reported cases.

Your petitioners further show that other questions of importance are involved herein namely:

1. Whether the indictment must aver that the violation was done knowingly, and the government prove this averment beyond a reasonable doubt as a material part of the case, and whether the indictment described offense with sufficient particularity to allow one to plead former jeopardy.

2. Whether the arrest without warrant preceeded the search, or followed the search, and as a matter of law whether either were lawful, having been made after sufficient evidence of probable cause.

3. Whether, where the opportunity existed to obtain and serve a proper warrant for arrest, or a search warrant, the officer, having the information, should have done so, and did this constitute unreasonableness and lack of prudence?

4. Whether cross-examination of the officers, as to reliability of information on which an arrest is made without warrant should have been allowed.

Your petitioners show that the lower courts either

ignored or ruled wrongfully upon each and all of the above questions and propositions of law.

Your petitioners are advised that the Circuit Court of Appeals erred in affirming the convictions and sentences of the District Court aforesaid, and contend that the District Court should have been reversed. Your petitioners present herewith as part of this petition a transcript of the record of the Circuit Court of Appeals.

Petitioners submit with this petition a brief discussing in detail the matters above suggested, to which the attention of this Honorable Court is directed.

Your petitioners, therefore, respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, entitled Richard Husty and Charles Laurel vs. United States of America, No. 5660, to the end that the said case may be reviewed and determined by this Court as provided by Section 240, Judicial Code, or that your petitioners may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

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BRIEF IN BEHALF OF PETITION FOR WRIT OF CERTIORARI

This petition seeks to review a judgment of the Circuit Court of Appeals, Sixth Circuit, entered, June 28th, 1930, (R-68), affirming a judgment of the Southern Division of Michigan, Western District, for violation of the National Prohibition Act, entered March 13th, 1930.

(References to the Record in the Circuit Court of Appeals will be in parenthesis containing the letter R followed by the page number).

The facts as disclosed by the evidence (R. 23 to 58) may be concisely stated as follows:

Upon the day of the purported arrest herein, it seems that a government officer received information over the telephone that Husty had liquor in an automobile at a certain location in Grand Rapids.

The officer testified that he met the person furnishing the information during the day (R-27). He further testifies that immediately after the arrest he made the search approximately at 8 P. M., and used the flash light in so doing, (R-31).

There is no positive evidence that the person furnishing the information had seen the liquor in the car, although Scully asked him if he had seen it in the car (R-28). Scully was the officer.

The officer claimed, of course, that the source of this information was reliable and that he believed he was acting prudently in relying upon it; and yet, although he knew the location of the liquor, and the description of the automobile in which it was located, and the name of the suspect, he did not deem the information sufficiently reliable to cause him to either secure a warrant for the arrest of Husty or a search warrant for

the search and seizure of the automobile described. Instead, he proceeded with other officers, to the location described, parked his car directly across the street from an automobile answering the description contained in the information received. He waited there for some period of time before Husty and Laurel, and another person who escaped, proceeded to get into the described automobile, and attempted to drive off with the same, until stopped and arrested by the government agents, within a foot or so after starting.

While awaiting directly opposite this suspected car for some period of time, it appears from the record that no attempt was made to secure a search warrant or a warrant for the arrest of Husty, who was suspected, and no attempt was made to inspect the contents of the automobile, although it stood there all this time, unoccupied, unlocked, and unguarded, and an inspection thereof would have revealed the presence of the liquor.

The arrest was made without warrant, and the search and seizure without search warrant.

There was nothing suspicious about the automobile or Husty before the car was stopped by the officers, and no evidence of the presence of liquor in the same.

There is no direct evidence in the record as to where Husty and Laurel came from, upon entering the automobile, to whom the automobile belonged, to whom the liquor belonged, or that they had any knowledge of the presence of the liquor in this automobile.

There is nothing in the record to indicate that Husty or Laurel, at any time, were ever involved in any sales of liquor, let alone habitual sales.

Nor is there any evidence of any commercializing attempts to violate the law.

There are no facts in the record that indicate, as-

suming this was Husty's liquor, otherwise than it was for personal consumption.

The indictment was drawn in the terms of the statute and in no way identified the occasion, place, kind, character, or quantity of liquors and gave no sufficient information to petitioners so that they could plead former acquittal or conviction against another indictment or trial. It also contained no reference to the provisions of the Jones Act regarding habitual sales and commercialization.

Cross-examination as to the source of the information received by the agents was refused, and counsel was not permitted to go into its dependability or question the credibility of the officers claim of reasonableness and prudence.

The arrest was held legal apparently, solely because the information received in this case turned out to be correct, the question of reasonable ground therefore being disregarded. That at the time, as far as the officers, knew, except from the hearsay information, Husty and Laurel were committing no offense and were not fugitives from justice.

The affirmance of the judgments and sentences by the Circuit Court of Appeals, amounting, as it does, to a virtual white-wash of all errors claimed in the proceedings in the District Court, it seems proper to specifically direct your attention, therefore, to the specification of claims advanced, all of which were denied, in the trial court, as folows:

First: *Motion to Suppress Evidence*, because of illegal and unlawful arrest, and consequent search and seizure; because as a matter of law, there was not sufficient evidence of probable cause, ample opportunity existed to obtain and serve a proper warrant for arrest

and a proper search warrant, or the arrest followed the search.

SECOND: *The Demurrer to the Indictment and the Motion to Quash,* on the grounds that the offenses were not set out with sufficient particularity, so that former convictions or jeopardy could not be set up against another indictment, and also because, the accused were not appraised or informed of the nature and cause of the accusation, as to whether it was a misdemeanor or a felony, under the Jones Act, and also because there was no averment of knowledge on the part of the accused.

THIRD: *At the Trial,* because there was no evidence of knowledge, and because the issues under the Jones Act as to habitual sales, or attempts to commercialize were not submitted to the jury, and because of the refusal to permit cross-examination of the officer as to the source of the communication received by him as effecting its credibility as a basis for probable cause and the reasonableness of the arrest.

FOURTH: *The Sentences,* being for a felony under the Jones Act was not intended to apply to an isolated case of transportation, (Count 1), mere convictions for possession are not within its terms, (Count 2), and convictions prior to the effective date of the Jones Law, especially for possession, cannot be considered in applying the penalty under this law; and also because the punishment is cruel and unusual, and the fine is excessive.

The constitutional provisions involved in this case are: Article 1, Section 9; Article 111, Section 2; and Amendments IV, V, VI, and VIII.

The sections of the National Prohibition Act are:

Title II, Sections 3, 25, 26, 29, 33, and the Jones Law, approved March 2nd, 1929.

The following cases will be cited to support the above claims:

United States vs. Setaro, 37 Fed. (2nd) 134 U. S. Dist. (Conn.)

Cisson vs. United States, 37 Fed. (2nd) 330 U. S. C. A. (4th).

Skelley vs. United States, 37 Fed. (2nd) 503 U. S. C. A. (10th).

United States vs. Kent, 36 Fed. (2nd) 401 U. S. Dist. (111).

Flynn vs. United States, 36 Fed. (2nd) 891 U. S. C. C. A. (1st).

Sapp vs. United States, 35 Fed. (2nd) 580 U. S. C. C. A. (8th).

United States vs. Lukas, 35 Fed. (2nd) 599 Dist. Ct. (Mass.)

United States vs. Lukas, 35 Fed. (2nd) 599 Dist. Ct. (Mass.)

United States vs. Soloman, 33 Fed. (2nd) 193 Dist. Ct. (Mass.)

The following cases will be referred to tending to oppose the above claims:

Ross vs. United States, 37 Fed. (2nd) 557 U. S. C. C. A. (4th).

Gurera vs. United States, 40 Fed. (2nd) 338 U. S. C C A. (8th).

McClvogne vs. United States, 40 Fed. (2nd) 889 U. S. C. C. A. (8th).

Brady vs. United States, 39 Fed. (2nd) 312.

ARGUMENT

Inasmuch as the application of the Jones Law, and its effect, appears in the foregoing grounds for reversal and, in some way, was involved in each claim before the

Circuit Court of Appeals, the argument will deal with the law under the above topics in the order above set out.

The constitutionality of this act seems to be acknowledged by the authorities, but there is some dispute as to its application, as effecting the constitutional rights of the offenders to a fair trial.

SUPRESSION OF THE EVIDENCE

In the case of *U. S. vs. Solomon*, 33 Fed. 2nd, 193, the question of the application of the Jones Law was first applied and it seems that the court holds that this act in making manufacture of intoxicating liquors a felony, all the officers would need to show justification for an arrest would be that he had reasonable grounds to believe that a felony had been committed. This case discusses the difference in relationship between a dwelling and outbuilding, and also discusses the case of *Carroll vs. U. S.*, 267 U. S. 132, 147, and shows the relation between the outbuilding and a driver of an automobile, where it is not practicable to secure a warrant in the case of the vehicle which can be quickly moved.

In the case at bar, there was no such reasonable cause as existed in the Solomon case, and the holding in the Carroll case can not apply, because the evidence discloses that the officer in the case at bar had ample opportunity, with the information he had at hand, if reasonable, (which he apparently did not believe it to be), to secure and serve proper warrants.

Of course, in the case at bar the evidence used as the basis of reasonable and probable cause in no sense measures up to the evidence used as the basis for the arrest in either the Carroll case or the Solomon case.

This is evident from an examination of the facts in these three cases.

In the case of *U. S. vs. Setaro*, 37 Fed. (2nd) 134), the court held that the crime of transportation of liquor, which was formerly a misdemeanor, is not necessarily converted into a felony by the Jones Act, providing that certain offenses, including that of transporting liquors may be punished by imprisonment, etc., since Section 91 provides that it is the intent of Congress that the Court should discriminate between casaul or slight violation and habitual sales or attempts to commercialize violation of the law; but transportation of liquor upon occasions of slight or casual violation is still merely a misdemeanor. The court also holds that to render a lawful arrest for misdemeanor without warrant, the offense must have been committed in the presence of the officer.

If the officer in the case at bar made a valid arrest, how did he know whether it was for a misdemeanor or felony? This uncertainty in itself should eliminate any hypothesis of probable cause or reasonableness. If the arrest turned out to be a misdemeanor, which could only be ascertained after trial, then the evidence should have been suppressed because there was no offense committed directly in the presence of the officer; or within his knowledge except and unless by reason of the presence of the liquor.

In the above cited Setaro case, the accused had been under observation as in the case at bar, (R-P. 35) apparently upon some hearsay evidence that he was a bottlegger. After the officers saw the accused drive into the garage and take two cans (apparently liquor) from the garage to the store, they drove into the place and after displaying their badges and without threats of any kind

and without making an arrest, they asked the accused whether or not he had any liquor in his car, whereupon, the accused replied he had, and thereupon, one of the agents stepped into the garage and looked into the car and observed a five gallon can, which the accused said contained alcohol, together with 1½ cases of whiskey and gin. The court held that there was not probable cause for search or an arrest; *that there was not in fact an arrest;* and that the search and seizure must be incidental to an arrest.

In the case at bar, the officers saw nothing before Husty got into the car, like the carrying of two cans that appeared to contain liquor, or any other circumstance, except the information the officers received, together with the presence of the automobile and Husty, as described in this communication.

It must be remembered in this connection that the trial Judge refused to permit cross-examination of the officer as to the source of the officer's information regarding Husty and his car, (R-P. 34, 38, 39, 40) and, therefore, it was impossible to know whether the person furnishing this information had actual knowledge himself or whether his knowwledge was from hearsay to the n'th degree. The basis, therefore, for probable cause on the part of the officers was much less in the case at bar than in the Setaro case above cited, because in the latter case, the officers could see with their own eyes something tending to substantiate the information received.

There was also no arrest prior to the search in the case at bar. There is nothing in the record indicating that an arrest was made until the liquor was observed in the back end of the automobile.

In addition to the Setaro case, you are referred to the well recognized authorities on what constitutes an arrest in the State of Michigan.

See, People vs. Margelis, 217 Mich. 423.

The most that you can say in this case is that the officers stopped the accused in a polite and decent manner as found in the case of *U. S. vs. Rembert*, 284 Fed. 998-99.

From these authorities, it would indicate that something definite must take place by the arresting officer to indicate that an arrest has been made, and something more than a mere stopping of his automobile, after it had moved for a foot or more, as in the case at bar.

In the case of *U. S. vs. Lukas*. 35 Fed. (2nd) 599, while the court held that there was evidence of probable cause, it appears that the officer received a written communication after which he interviewed the writer, after which he made inquiries regarding the same from others, after which he made several visits in the vicinity of the premises, then on one occasion detected the odor of distillation. On the morning of the search, he saw the defendant come out of the house with a bundle wrapped in burlap and place it in an automobile, which bore registration number identical with that contained in previous information: *but you will find no such a line-up of evidence to support the communication in the case at bar.*

We have been unable to find any case where merely a communication and the discovery of the identity of the person and of the automobile is regarded as sufficient probable cause as a matter of law.

Of all the cases dealing with this subject, no court has had the temerity to go so far as to say that this

meager line-up of facts is sufficient, in itself, as a basis for a reasonable arrest without warrant or a search and seizure.

The court in the Lukas case says,

> "while it is true that in the Carroll case, supra, the convincing information previously acquired had been obtained by the agents at first hand and not through an informer, and while in two recent cases in this Circuit, (Lafazia, et al. vs. U. S., 4 Fed. (2nd) 817; Segurola vs. U. S. 16 Fed. (2nd) 563, the agents had evidence of probable cause apart from confidential communications, I do not regard these cases as conclusive against the Government in the case at bar,"

and then, the court goes on to say that the communication should not be wholly excluded, of course, meaning that such a communication, apart and in itself, is not sufficient as a basis for probable cause.

In any event, without knowing whether the transportation was a felony or misdemeanor, under the Jones Law, how could the officer be reasonably sure he had a right to arrest at all?

See Amendment IV, U. S. Constitution.
People v. Stewart, 323 Mich. 570.

DEMURRER TO THE INDICTMENT AND MOTION TO QUASH

In the case of *Skelly vs. U. S.*, 37 Fed. (2nd) 503, the court held that under constitutional amendments V and VI, requiring that the indictment inform the accused of the nature and cause of the accusation, the indictment must be sufficiently certain as a pleading to enable the defendant to make his defense, by charging the crime with particularity, and must be sufficiently certain to

enable the accused to plead double jeopardy in case he should be indicted again for the same offense. The Court in this case said:

> "On the proposition that 'where a statute is general, it is not sufficient merely to follow its language in an indictment, but the indictment must allege the specific offense coming under the general description of the Statute, in order that the accused may enjoy the right, secured by the 6th Amendment,' see Boykin vs. U. S., 11 Fed. (2nd) 484-485 and cases there cited."

The National Prohibition Act is exactly the same character of act as found in the Skelley case, and the indictment in the case at bar is nothing more or less than an allegation of the violation of the terms of the act.

This indictment is brief, *in fact too brief*, and the liberty is taken at this time to state it in part:

TRANSPORTATION COUNT

Count I.

> "that heretofore and on or about, to-wit, the 10th day of December, A. D. 1929, at, to-wit, the City of Grand Rapids, in the County of Kent, in the State of Michigan, in said division of said district, and within the jurisdiction of this Court, Richard Husty and Charles Laurel then and there unlawfully did transport, namely, over and upon the public highways of the County of Kent and Streets of said City of Grand Rapids in said division and district, in an automobile, to-wit, a Graham Paige Coupe certain intoxicating liquor, namely spirituous liquor to-wit, more or less, of whiskey so-called, which said liquor then and there contained one-half of one per centum and more of

alcohol by volume, and then and there was fit for use and for beverage purposes, which said transportation then and there was prohibited and unlawful by virtue of the provisions of the National Prohibition Act; as amended.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

POSSESSION COUNT

Count II.

"And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and say:

That heretofore and on or about, to-wit, the 10th day of December, A. D. 1929, at, to-wit, City of Grand Rapids, County of Kent, and State of Michigan, in said division of said district and within the jurisdiction of this Court, Richard Husty and Charles Laurel then and there unlawfully did possess certain intoxicating liquor, namely, spirituous liquor to-wit, whiskey which said liquor then and there contained one-half of one per centum and more of alcohol by volume, and then and there was fit for use for beverage purposes, which possession then and there was prohibited and unlawful by virtue of the provisions of the National Prohibition Act; as amended.

Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States." (R. 1 & 2).

It is to be observed that neither count specifies the place, the time this liquor was transported and possessed, or the amount thereof. This was a fatal omission in the Skelley case.

In the case of *McElvogue vs. U. S.*, 40 Fed. (2nd) 889, the Court in its opinion specifically referring to an

attack upon the indictment held that the time and place and amount of liquor sold was sufficient in describing the charge.

In the case of *Guerera vs. U. S.*, 40 Fed. (2nd) 338, on a demurrer to the transportation count, the time and the amount covered by the transportation and contained in the indictment, was held to be sufficient.

Although, in these last two named cases, the courts do not hold that these specifications are necessary, nevertheless, it is to be noted that the indictments contain the same as necessary averments to the validity of the indictments and the Courts not being called upon to pass specifically upon this requirement, of course, did not do so.

In the case of *Sapp vs. U. S.*, 35 Fed. (2nd) 580 U. S. C. C. A. (8th), the indictment contained the hour, the street address, the city, and although the question as to whether these averments are necessary was not raised, this is an indication of what is necessary and proper in making this character of charge.

In a recent case before the Supreme Court of the District of Columbia, in the case of the U. S. vs. Dennison, a demurrer, similar to the case at bar, was sustained because the accusation preferred was drawn solely in the words of the Statute, in no way identifying the occasion of the possession, the place, the kind, the character, quantity of intoxicating liquors and gave no sufficient information to the defendant so that former acquital or conviction against another indictment or trial could not be pled. The number of this case is not now available and it is not reported. Dennison was a member of the House of Representatives and the case gained widespread publicity.

It is to be noted that nowhere in this indictment do we find the accused charged with *knowingly* having transported or possessed the liquor. In all of the indictments in the last three named cases, we find the averment of knowledge on the part of the accused. In the Skelley case the averment of knowledge was omitted, while not specifically held to be fatal, *yet the demurrer to the indictment was sustained.*

The indictment made no reference, as you well know, to any claim under and by virtue of the Jones Law. In the case of *U. S. vs. Kent,* 36 Fed. (2nd) 401, the indictment specifically charged a violation of the National Prohibition Act within the provisions of the Jones Law, thus, indicating that a charge under the Jones Law must appear in the indictment in order to properly advise the accused in accordance with Amendment VI of the Constitution. While the question as to the necessity of such an averment in the indictment did not appear in this case directly, and while the constitutionality of the Jones Act was directly attacked by this demurrer, nevertheless, the court would not have been compelled to pass upon the constitutionality of the act, as set forth in this indictment, but could have overruled the demurrer on the ground that this averment was not a material averment.

In the case at bar, an isolated charge of transportation was made against Husty and Laurel. They had no knowledge whether the charge against them was one of felony or for a misdemeanor; whether they were to be considered as charged with a casual or slight violation, or with habitual sales and attempts to commercialize violations of the law.

As this court knows, there is quite some difference

between a misdemeanor and a felony, and the nature and cause of the accusation between the two degrees of crime. In the Setaro case, supra, the court after relating that prior to the Jones Act, transportation was a misdemeanor, and that after this act, transportation could be punished by imprisonment not to exceed five the court said:

> "If the statute stopped at this point, it would be clear that those offenses are now felonies. But the Jones Act does not stop at this point. It continues with the following: "Provided, That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law."
>
> "This proviso and its language require attention and consideration. Was Congress legislating when it added this proviso, or was it merely expressing a pious wish? Did Congress intend to restrict the punishment in cases of "casual or slight violations" to penalties meted out to misdemeanants, or did it merely express a hope that the Courts would fit the penalty to the crime?"

All this means, of course, that Amendments V and VI of the Constitution have been seriously threatened by this Jones Act, unless a proper construction can be placed upon this proviso to save it from being unconstitutional.

AT THE TRIAL

Following the consideration of the Jones Act with reference to the indictment, it necessarily follows, that if the issues raised by the proviso in this act should be included in the indictment, then the issue should be pre-

sented to the jury and should be included in the charge of the court.

The nature of this contention is set forth in *United States vs. Kent,* 36 Fed. (2nd) 401. You are referred to the language of the court on page 403. And while the court in this case does not approve all the contentions made in the case at bar, the language of our contentions are amply set forth in this opinion on page 403, and furnishes also the only answer that can be made to the contentions, that the failure to submit this issue to the jury is a disregard of Article III, Section 2, of the Constitution.

In the Setaro case, the court, on page 162 of the opinion, concluded that whether or not the offense of the National Prohibition Act is a felony or misdemeanor, could not be determined in advance of trial. In that event, the jury should have the issue, because the court in this case said,

> "As I have construed the language of this Act, it seems to me that upon occasion of 'slight or casual' violation, the offense is punishable as a misdemeanor".

The McElvogue case, supra, and the Gurera case, supra, considers this proviso as being one entitled to determination by the court, and not one properly to be considered by the jury. This indicates to some degree the conflict of authority, which this court must definitely pass upon.

On the subject of there being no evidence of knowledge that the car contained liquor the record speaks for itself. There is clearly no competent evidence that the automobile or the liquor belonged to either Husty or Laurel. There is no evidence of any character that

Husty knew that there was any liquor in the automobile, although Laurel attempted to run from the machine upon seeing the officers, that cannot be a basis for imputing any knowledge on the part of Husty.

The question of failure to permit the cross-examination of the officer with respect to the source of the information he received about the transaction has already been gone into. This applied more to the question of the validity of the arrest.

THE SENTENCE

In the case of *U. S. vs. Setaro*, 37 Fed. (2nd) 134, the court construed the language of the Jones Act contained in the proviso as meaning that "slight or casual violations" of the offense is punishable as a misdemeanor.

In the case of *Cisson vs. U. S.*, 37 Fed. (3rd) 330, the court said:

> "In view of the fact that the case is remanded as it is, it is not necessary that we pass upon the contention that the sentence imposed was a cruel and unusual punishment forbidden by the Constitution, of course, the matter of punishment, if within the limits described by the Statute, is ordinarily a matter within the discretion of the trial judge.
>
> It would seem, however, that under the National Prohibition Act such punishment as was inflicted here would be justified only where there is proof of repeated sales, or a charge to commercialize violations of the law, or other circumstances of aggravation, such is the intent of Congress as explained in the Jones Act."

In this case the sentence was for a term of five

years, for sale on the second offense, and it appearing that the *sale took place prior to the passage of the Jones Law, the Court held that this law must be construed as applying ONLY to crimes committed after its passage and that Congress is forbidden to pass an ex-post-facto law.*

See the case of *Ross vs. U. S.*, 37 Fed. (2nd) 557 which is a case on the constitutionality of the Jones Act the Eighth Circuit Court of Appeals followed and which in *McElvogue vs. U. S.*, 40. Fed. (2nd) 889 and *Gurara vs. U. S.*, 40 Fed. (2nd) 338. In the Ross case, the defendant maintained a place for the purpose of selling whiskey, a buzzer announced the arrival of anyone at the place where the sale was made, there was a peep-hole, etc., and the place had all the ear marks of being a "speak-easy," and all the circumstances brought the crime for which the defendant was convicted under the claims of attempts to commercialize violations of the law and clearly pointed to habitual sales. In this case Ross was sentenced for two years, but Circuit Judge Waddill rendered a long dissenting opinion, in which he considered that the sale of two drinks of whiskey by a first offender, could not be construed as the habitual sale of intoxicating liquor. This dissenting opinion is respectfully submitted on the proposition of whether or not in the case at bar we have a felony or a misdemeanor, and whether in the case at bar the sentence should be imposed accordingly.

In the Guerera case, supra, the transportation was held to come within the terms of the Jones Act and the defendant was sentenced for a period of only two years. This case is about the most severe that has been re-

ported. It has gone the farthest of any that we have been able to discover in the matter of penalty.

In the McElvogue case, supra, the defendant pled guilty to the first count out of four counts for sales on different dates and was sentenced to one year and one month under the Jones Law. In this case, the court held that because of pleading guilty to one count, rather than take the risk of pleading "not guilty" to the four counts of sales, this was evidence that the defendant was engaged more or less in an established business of this sort.

With this diversity of opinion on this subject, there does not seem to be any definite or fixed rule at this time that can guide Federal Courts or the State Courts in sentencing violators under the Prohibition Act.

This case, therefore, should be reviewed and the meaning of the proviso in the Jones Act should be definitely construed as to its effect and operation.

It is to be observed that the Circuit Court of Appeals in its judgment, (R. p. 68,) finding (4), holds that the sentence in the case at bar was supported by conviction on the second count. If the Circuit Court of Appeals in the case at bar had found the sentence supported by conviction on the first count, for transportation, it is possible to say that there might be, under the constructions of the 8th Circuit, some basis for its finding.

But the Jones Act unfortunately omits the word "possession" from among the crimes listed to which the so-called "5 & 10" penalty applies, *so that under any theory a sentence of five years and a fine of Three Thousand* ($3000.00) *Dollars would not be warranted for possession alone under the Jones Act.*

And further, also, if the Circuit Court, in affirming the sentence, in any way considered the convictions for

possession occurring prior to the passage of the Jones Law, this would tend to violate Article I, Section IX of the Constitution.

This claim is supported by the holding in the Cisson case, supra, where the Court said that the Jones Act had no application to offenses committed before its effective date.

It is our contention that the Jones Act cannot apply to an isolated case of transportation. The Circuit Court of Appeals in holding that the sentence was supported by conviction on the second count, directly infers that conviction in this case on the first count could not sustain a sentence for felony under the facts of an isolated violation for transportation.

We submit that the reasoning in the Setaro case, the Cisson case, and the dissenting opinion in the Ross case should be recognized in this Supreme Court even though this Court may find the Jones Law constitutional.

That while the case of *Brady vs. U. S.*, 39 Fed. (2nd) 312, and similar holdings, may be approved, the Constitution of the United States should still be in some measure respected and this Act should be so construed as to bring it in harmony with the constitutional provisions recited herein.

On the subject of cruel and unusual punishment and excessive fine, while the declaration in the Cisson case may, to some extent, be obiter dicta, nevertheless, the court did not hesitate to declare that the sentence imposed therein was in conflict with Article I, Section IX, of the Constitution.

This Court has decided in *U. S. vs. Farrar*, 281 U. S. 624, that inasmuch as the word "purchaser" is not

specifically referred to in the proper place in the National Prohibition Act that a purchaser does not come within the purview of the Act, and in the same manner, one in possession of liquor cannot come within the purview of the Jones Law.

We, therefore, submit to this Honorable Court that the matters and things referred to herein should be reviewed to the end that the doubt existing as to the proper application of the Jones Law should be settled, and that the injustice of the sentence, the arrest, search and seizure, the indictment and other matters as to these petitioners may be rectified and the judgments of the lower Courts reversed.

Respectfully submitted,

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No. 477

In the Supreme Court of the United States

OCTOBER TERM, 1930

RICHARD HUSTY AND CHARLES LAUREL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 477

RICHARD HUSTY AND CHARLES LAUREL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by either the District Court or the Circuit Court of Appeals.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 28, 1930. (R. 68.) The petition for certiorari was filed September 26, 1930. Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether the search and arrest were upon probable cause.

2. Whether the indictment adequately stated a criminal offense.

3. Whether the sentences imposed were warranted by the convictions.

STATUTE INVOLVED

The Act of March 2, 1929, c. 473, 45 Stat. 1446 (U. S. C. Sup. III, Title 27, Secs. 91, 92), commonly known as the Jones Act, provides:

> That wherever a penalty or penalties are prescribed in a criminal prosecution by the National Prohibition Act, as amended and supplemented, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 1, Title II, of the National Prohibition Act, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: *Provided,* That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law.
>
> SEC. 2. This Act shall not repeal nor eliminate any minimum penalty for the first or any subsequent offense now provided by the said National Prohibition Act.

STATEMENT

On March 5, 1930, the petitioners were indicted in the District Court on two counts respectively charging them with transportation and possession of whisky in violation of the National Prohibition Act. The second count set forth prior convictions of the petitioner Husty for unlawful possession of intoxicating liquor on November 9, 1922, and on April 3, 1928. (R. 1–3.) Upon being arraigned both petitioners stood mute, whereupon a plea of not guilty was entered as to each. (R. 3.) A motion was made to suppress the evidence, and a demurrer and a motion to quash were filed to the indictment, all of which were overruled. (R. 4–10.) A motion was made by petifioner Husty for a separate trial, which was also denied. (R. 9.) After a trial both petitioners were found guilty as charged. (R. 10–11.) Motions for a new trial and for judgment *non obstante veredicto* having been overruled, the petitioner Husty was sentenced to five years in the penitentiary and to pay a fine of $3,000, and Laurel was sentenced to one year and six months in the reformatory. (R. 11–15.) Upon appeal the convictions were affirmed by the Circuit Court of Appeals. (R. 68.)

The evidence tended to establish the following facts:

On December 10, 1929, one Scully, a Deputy Prohibition Administrator, received detailed information that the petitioner Husty had two loads of

liquor parked in a Graham-Paige coupe and a Studebaker sedan, near the vicinity of Jefferson and Pleasant Streets, in Grand Rapids, Michigan. (R. 25, 26.) Scully had known Husty since 1922 and knew that he was a "bootlegger," having arrested him in 1922 and again in 1928 for violation of the National Prohibition Act, both of which arrests resulted in convictions. (R. 23–24, 54.) Acting on the information which he had received and which came from a person he had known for eight years and who had previously given him reliable information, Scully, with Prohibition Agent Harring, went to the place described about 8 o'clock that night and found the Graham-Paige. Husty was not there at this time but appeared shortly afterward with the petitioner Laurel and a third man, all three of whom got into the Graham-Paige. Husty started the car and had moved a few feet when Scully, who had his car parked near by, pulled up in front of the coupe and stopped it. Laurel and the third man ran. (R. 25–26, 52.) Scully then looked into the coupe and saw whisky bottles containing a liquid. He also saw bags which appeared to be filled with bottles. (R. 32, 52.) Further search disclosed eighteen cases of whisky. (R. 26, 52.)

At the time of arrest Husty had upon his person $960 in cash and two checks. Laurel, when arrested, stated that he had come over that day from Detroit with Husty in the Graham-Paige coupe, that he had not known Husty before that time and did not know that the car contained liquor. (R. 52–53.)

Agent Harring's testimony concerning the arrest and seizure was substantially the same as Scully's. (R. 53–54.)

ARGUMENT

I

THE ARREST AND SEARCH WERE UPON PROBABLE CAUSE

The petitioners moved to suppress the evidence secured from the search of the car in which they were arrested upon the ground that their arrest and the search of the car, made without warrants, were without probable cause.

Scully had known petitioner Husty as a bootlegger since 1922, having arrested him on two prior occasions for unlawful possession of intoxicating liquor, both of which arrests resulted in convictions. The information that Scully acted on came from a man whom he had known for eight years and whose information he believed he could rely on with prudence. Scully had received "tips" before from this same person and had always found them reliable. (R. 26.) This, together with his personal knowledge that Husty was a "bootlegger," and the fact that the car was found at the place described, was sufficient, we submit, to warrant Scully in believing that intoxicating liquor was being unlawfully transported in the automobile which he stopped and searched. *Carroll* v. *United States*, 267 U. S. 132. See also *Kudy and Langtry* v. *United States*, No. 392, October Term, 1930, certiorari denied, October 20, 1930.

It is contended by the petitioners that if Scully deemed the source of his information reliable he had ample time in which to have secured the proper warrants. But the officer had no means of knowing how soon the car might be moved. In the *Carroll case, supra,* it was pointed out that, if it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought, the officer may proceed without a warrant.

II

THE INDICTMENT ADEQUATELY CHARGED A CRIMINAL OFFENSE

The petitioners contend that the indictment does not charge the crimes alleged with sufficient particularity. The indictment alleges the unlawful transportation in a Graham-Paige coupe and the unlawful possession of intoxicating liquor fit for use for beverage purposes, to-wit, whisky, on December 10, 1929, in Grand Rapids, Kent County, Michigan, within the jurisdiction of the court. (R. 1–2.) It is submitted that this indictment contained all the substantial elements of the offenses averred and duly informed the petitioners of the charges against them. There is nothing in the record indicating that they were taken by surprise or that they were in any doubt as to the offenses with which they were charged. While the indictment did not expressly mention the Jones Act, it charged the

commission of the alleged offenses subsequent to March 2, 1929, the effective date of the Act. If the petitioners had desired any further information as to the time and place of the alleged offenses it could have been supplied by a bill of particulars. *Durland* v. *United States*, 161 U. S. 306, 315. No motion for a bill of particulars was made.

In *Skelley* v. *United States*, 37 F. (2d) 503 (C. C. A. 10th) cited by the petitioners in support of their contention that the indictment should have stated with more particularity the *place* of the commission of the offenses charged the objection was raised by special demurrer. In the instant case the demurrer and motion to quash were general in form, and no prejudice being shown the objection is not available. R. S. § 1025 (U. S. C., Title 18, Sec. 556). *Ledbetter* v. *United States*, 170 U. S. 606, 613; *Myers* v. *United States*, 15 F. (2d) 977 (C. C. A. 8th); *Leonard* v. *United States*, 18 F. (2d) 208 (C. C. A. 6th).

The petitioners further contend that the indictment was insufficient because it did not advise them whether they were charged with a misdemeanor or a felony, or whether they were charged as casual or slight offenders or as habitual or commercial violators. This complaint is apparently based on the theory that the Jones Act created new offenses, for without that as a premise there is nothing upon which such argument can rest. But the Jones Act created no new offenses. Its obvious purpose was to increase the maximum penalties which might be

imposed for certain violations of the National Prohibition Act. The proviso to the Jones Act defines no new crime, but merely cautions the court to exercise a judicial discretion in the imposition of sentences. *Ross* v. *United States*, 37 F. (2d) 557 (C. C. A. 4th), certiorari denied, 281 U. S. 767; *United States* v. *Kent*, 36 F. (2d) 401 (S. D. Ill.). Contentions similar to those relied on by petitioners were made in *McElvogue* v. *United States*, No. 167, October Term, 1930, in which this Court denied certiorari on October 13, 1930.

III

THERE IS NO GROUND UPON WHICH THIS COURT SHOULD REVIEW THE SENTENCES

The Jones Act gives the trial court *power* to impose sentence of imprisonment not to exceed five years and fine not to exceed $10,000 for any violation of the National Prohibition Act. Here neither sentence exceeded these limits. Obviously, the proviso that Congress intended the court to use discrimination in imposing sentence was not intended as a limitation upon the power of the court, and if the sentence was excessive the remedy is with the Executive. Certainly the sentence authorized by statute can not be reviewed on a bill of exceptions. This precise point was raised in *Ross, Petitioner*, v. *United States*, No. 886, October Term, 1929, in which petition for certiorari was denied by this Court on June 2, 1929 (281 U. S. 767).

The validity of the sentences is further questioned on the ground that they contravene the constitutional provision relating to *ex post facto* laws. The contention of the petitioners apparently is that in applying the proviso of the Jones Act requiring the trial court in imposing sentence to discriminate between "casual or slight violations" and "habitual sales" or "attempts to commercialize violations of the law," the trial court may not consider any violations of the National Prohibition Act occurring prior to the enactment of the Jones law. Such contention is clearly not tenable. *McDonald* v. *Massachusetts*, 180 U. S. 311; *Graham* v. *State of West Virginia*, 224 U. S. 616.

CONCLUSION

No substantial ground is presented for the allowance by this Court of a writ of certiorari, and the petition should therefore be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1930

RICHARD HUSTY AND CHARLES LAUREL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

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No. 477

RICHARD HUSTY AND CHARLES LAUREL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by either the District Court or the Circuit Court of Appeals.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 28, 1930. (R. 62.) The petition for certiorari was filed September 26, 1930, and was granted November 24, 1930. (R. 62.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the arrest of the petitioners and the search and seizure of the automobile involved were upon probable cause.

2. Whether the indictment states an offense.

3. Whether the sentences imposed were warranted by the convictions.

STATUTES INVOLVED

The statutes involved are set forth in the appendix to this brief, pp. 21–23, *infra*.

STATEMENT

On March 5, 1930, the petitioners were indicted in the United States District Court for the Western District of Michigan on two counts respectively charging them with transportation and possession of whiskey in violation of the National Prohibition Act. The second count set forth prior convictions of the petitioner Husty for unlawful possession of intoxicating liquor on November 9, 1922, and on April 3, 1928. (R. 1–3.) Upon arraignment both petitioners stood mute, whereupon a plea of not guilty was entered as to each. (R. 3.) A motion was made to suppress the evidence, and a demurrer to the indictment and a motion to quash it were filed. All of these were overruled. (R. 3–8.) A motion was made by petitioner Husty for a separate trial, which was also denied. (R. 7–8.)

The testimony at the hearing on the motion to suppress the evidence is discussed on pp. 7–8, *infra*.

The testimony at the trial on the merits was brief and uncontradicted. Arthur Q. Scully, Deputy Prohibition Administrator, testified that on the evening of December 10, 1929, he saw the petitioners with a third man get into a Graham-Paige coupé near the corner of Jefferson Avenue and Pleasant Street in Grand Rapids, Michigan, that petitioner Husty took the wheel and started the motor and had started to pull out into traffic when the witness stopped him. The petitioner Laurel and the third man got out of the car and ran. The witness was accompanied by Ray W. Harring, a Prohibition Agent. The petitioners were arrested[1] but the third man got away. The witness saw whiskey in the car, and later searched the car thoroughly and found eighteen cases and one quart of whiskey. One of the bottles was introduced in evidence. The witness searched the petitioner Husty after arresting him and found $960 in cash and two checks on his person. Husty refused to make any statement regarding the money. The petitioner Laurel stated that he had not known Husty until the afternoon of that day, that he came over from Detroit in the car, that he did not know that liquor was in the car, and

[1] The record does not show clearly whether the arrest was made before or after the search, but, as pointed out on page 12, *infra*, the time of arrest is not material.

that he did not know who the man was who escaped. (R. 47–49.)

Harring corroborated the testimony of Scully. (R. 49–50.) The defense introduced no testimony, and admitted that Husty had been twice before convicted of unlawful possession of liquor. (R. 50.)

The court instructed the jury to return a verdict, "We find Respondents guilty as charged," if they should find both of them guilty on both counts, and to indicate by the verdict the count upon which each was convicted in the event of an acquittal of either defendant on either count. (R. 56–57.) The verdict of the jury showed that both were convicted on both counts, as it stated that the jury found "defendants guilty in manner and form as the government have in their indictment in this cause alleged and complained against them." (R. 8.)

After overruling motions for a new trial and motions for judgments *non obstante veredicto*, the court sentenced petitioner Husty to five years in the penitentiary and to pay a fine of $3,000, and petitioner Laurel to one year and six months in the reformatory. The sentences were general, not referring to either of the counts. (R. 9, 12.) The convictions were affirmed by the Circuit Court of Appeals without opinion, the judgment of the court reading as follows (R. 62):

> It appearing (1) that the search was reasonable and the motion to suppress properly denied; (2) that the indictment was good

and that it was not necessary to make reference therein to the so-called Jones Law; (3) that it was proper upon the trial to exclude evidence as to the reasons for the search,—that subject matter having been foreclosed by the decision of the motion to suppress; (4) that the sentence was supported by conviction on the second count; (5) and that the other errors alleged are not well taken—

Ordered that the judgment and sentence of the court below as to each appellant be and is hereby affirmed. Let the mandate issue forthwith.

SUMMARY OF ARGUMENT

I

The motion to suppress the evidence was properly overruled. No warrants were necessary and the arrest and the search of the car were upon probable cause. The prohibition officer had known Husty as a "bootlegger" for a number of years, having previously arrested him for liquor violations, which arrests resulted in convictions. The information upon which the officer acted was definite and recent. It came from a man well known to him and upon whom he was justified in relying because of ample experience. These facts, together with the fact that the car was found at the exact place described, were sufficient to warrant the officer in believing that intoxicating liquor was being unlawfully transported in the automobile which he stopped and searched. The contention that there

was no arrest prior to the search and that arrest must precede the search is foreclosed by the decision of this Court in *Carroll* v. *United States*, 267 U. S. 132, 158.

The refusal of the court to permit counsel for the accused to question the officer as to the identity of his informant was in accordance with the authorities; and we submit that petitioners have not preserved their rights to raise this point.

II

The indictment sufficiently charged offenses under the statute as amended. It mentioned all the essential elements of those offenses and alleged that the offenses took place within the jurisdiction of the court. There is nothing to indicate that petitioners were taken by surprise or that they had any doubt as to the charges which they were expected to meet. Any further information necessary to their defense could have been supplied by a bill of particulars, but this was not demanded.

III

Although the judgment of the Circuit Court of Appeals was incorrect in stating that the sentences were supported by conviction on the *second* count of the indictment, they should not be disturbed. The sentences were within the power of the court to impose for the offense of transportation charged in the first count, of which petitioners were also convicted. The sentence imposed on each de-

fendant was a general one. The proviso in the Jones Act that the court discriminate in imposing sentences was not intended as a limitation upon the power of the court.

ARGUMENT

I

THE ARREST AND SEARCH AND SEIZURE WERE UPON PROBABLE CAUSE

The petitioners moved to suppress the evidence secured from the search of the car, on the ground that their arrest and the search of the car, made without warrants, were without probable cause.

That no warrants were necessary is settled by the decision of this Court in *Carroll* v. *United States*, 267 U. S. 132. The question is whether there was probable cause for the arrest and search. In the *Carroll* case (p. 161) this Court approved the following definition of probable cause:

> "If the facts and circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."

The Government contends that the evidence introduced at the hearing on the motion to suppress was sufficient to show probable cause, as so defined. Scully had known petitioner Husty as a "bootlegger" for a number of years. He had arrested him in 1922 and again in 1928 for violations of the prohibition laws. These arrests resulted in convictions. (R. 18–19, 23.) The officer thus had di-

rect proof of the "bootlegger's" activities. In the *Carroll* case there was no direct evidence of law violations prior to the arrest.

On the day in question Scully received information that Husty had two loads of liquor in certain automobiles, parked at particular places on certain named streets. (R. 19–20.) This information came to Scully from a man in whom he had confidence. He had previously received information from this man and had always found it reliable. (R. 21.) He had known this man about eight years, had met him on the street and in his own office as well as in this man's office on numerous occasions, and had come in frequent contact with him in a business and social way. (R. 21.) In his extended experience with this man he had always found him truthful. (R. 24.) The information first came to the witness over the telephone, but he later met the man personally. He asked the informer whether he had personal knowledge of the information he was imparting and whether he had seen the liquor in the car. He was assured that the liquor was in the car. (R. 22–23.)

In response to the information so obtained, Scully went to look for the cars in question and found one of them at the place designated by his informant. Husty was later seen getting into the car and attempting to drive it away. When he was stopped, the two men with him ran from the scene, and the car was found to be loaded with liquor. (R. 20, 23, 47–48.)

This was not a case of stopping an automobile on the chance of finding liquor. The information which Scully had was recent, definite, and convincing. Under all these circumstances the following language which this Court used in the *Carroll* case is peculiarly applicable (pp. 158, 162, 161):

> The language of the section [Section 26] provides for seizure when the officer of the law "discovers" any one in the act of transporting the liquor by automobile or other vehicle. Certainly it is a very narrow and technical construction of this word which would limit it to what the officer sees, hears or smells as the automobile rolls by and exclude therefrom, when he identifies the car, the convincing information that he may previously have received as to the use being made of it.
>
> * * * * *
>
> * * * it is clear the officers here had justification for the search and seizure. This is to say that the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor was being transported in the automobile which they stopped and searched.
>
> "* * * if he [the officer] suspects one on his own knowledge of facts, or on facts communicated to him by others, and thereupon he has reasonable ground to believe that the accused has been guilty of felony, the arrest is not unlawful."

In the *Carroll* case the car was stopped on the highway several months after the transaction which the officers had with the defendants. They were not looking for the defendants at the time. Here Scully was looking for Husty immediately after receiving information that he had liquor. The conclusion of this Court in the *Carroll* case (p. 160) would seem to be clearly applicable here:

> That the officers when they saw the defendants believed that they were carrying liquor we can have no doubt, and we think it is equally clear that they had reasonable cause for thinking so.

In *Brady* v. *United States*, 300 Fed. 540 (C. C. A. 6th), the prohibition agents received information that a distillery was to be robbed on a certain night and that the liquor was to be transported over a designated highway in two described cars. The officers stationed themselves on the highway, stopped several cars as they came along, and finally intercepted the two cars they were looking for. They had no prior knowledge of the defendants' "bootlegging" activities, as in the instant case, and had nothing upon which to base their search except the information given them by their informant and, possibly, the additional fact that as the cars approached them they noticed that they were accompanied by a covered truck. The search and seizure were upheld, and certiorari was denied by this Court. 266 U. S. 620.

In *United States* v. *Lukas,* 35 F. (2d) 599 (D. Mass.), the prohibition officers received a written communication that liquor was being transported from a certain house in a described automobile. The communication was turned over to an agent who interviewed the informant and made certain independent investigations concerning the informant and the defendant—a procedure not necessary in the instant case because here the officer believed his informant trustworthy and also knew that the man informed against was a "bootlegger." On the morning of the search the agent saw the defendant come out of the house with a bundle and place it in the automobile. After the defendant drove away the agent stopped and searched the car and found therein a quantity of liquors. There was nothing in the conduct of the defendant which, independent of other facts, would excite suspicion, nor did the agent obtain any information by the use of his senses respecting the contents of the package. Relying on the ruling of this Court in the *Carroll* case, that the officer is not limited "to what he sees, hears or smells" at the time of the search, but may rely upon any "convincing information that he may previously have received as to the use being made of" the automobile, the court held that there was present that "probable cause to believe" essential to the validity of a search without a warrant (p. 600).

See also *Ash* v. *United States,* 299 Fed. 277 (C. C. A. 4th); *Park* v. *United States,* 294 Fed. 776,

782–783 (C. C. A. 1st); *Kudy and Langtry* v. *United States*, decided June 28, 1930 (C. C. A. 6th); certiorari denied October 20, 1930 (No. 392).

Petitioners complain that there was no arrest prior to the search. They contend that there is nothing in the record indicating that the arrest was made until after the liquor was discovered. The contention is foreclosed by the *Carroll* case, where it was held (p. 158) that the right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law. In fact, the language of Section 26 of the National Prohibition Act (*infra*, pp. 21–22) seems to contemplate that the seizure should precede the arrest.

Petitioners further contend that if Scully deemed the source of his information reliable he had ample time in which to have secured the proper warrants. But the officer had no means of knowing how soon the car might be moved. In the *Carroll* case (p. 153) it was pointed out that if it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought, the officer may proceed without a warrant.

The petition for certiorari (p. 4) suggests as one of the questions involved herein, "Whether cross-examination of the officers, as to reliability

of information on which an arrest is made without warrant should have been allowed;" and the matter is alluded to in the supporting brief (p. 13), although it is not argued there at length. We are left in some doubt as to petitioners' exact position in regard to this matter. If their contention is that in the absence of testimony as to the identity of the informant it did not appear that the searching officer had probable cause, we submit that the objection is without weight. The testimony which was introduced was sufficient.

If petitioners' objection is that the action of the court in sustaining objections to certain questions asked during the hearing of the motion to suppress in itself constituted reversible error, our answer is (1) the petitioners are not in a position to raise this objection, and (2) the objection is not valid.

(1) The errors assigned on appeal not only did not specify any particular questions but did not refer even generally to any matter of admissibility of evidence arising on the hearing of the motion to suppress. The only error assigned in regard to the exclusion of testimony was No. 22 (R. 14), which reads as follows:

> That the trial court committed prejudicial error in sustaining the objections of counsel for plaintiff tending to show the defendants efforts to determine that the information upon which the arresting officer acted and made the arrest was from a reliable or unreliable source.

That part of the transcript which reports the hearing on the motion covers over twenty pages (R. 17–41) and is replete with questions asked by petitioners' counsel as to which objection was sustained. Even if the specification of error quoted above can be construed to refer to this hearing, we submit that it is not sufficiently specific to require this Court to pass upon it. It may refer to matters of the same nature arising at the trial. (See R. 53.) The Circuit Court of Appeals evidently so treated the specification, as its judgment stated "that it was proper upon the trial to exclude evidence as to the reasons for the search,—that subject matter having been foreclosed by the decision of the motion to suppress;" although the judgment also recited "that the other errors alleged are not well taken." (R. 62.)

(2) The rulings in the course of the hearing of the motion were correct. They were in accord with the decision in *Segurola* v. *United States*, 16 F. (2d) 563, 565 (C. C. A. 1st), and authorities there cited, where it was held that the trial court properly sustained an objection to a question as to who gave the confidential information that a certain car was coming through with liquor, the ground of the objection being that the source of such information was a secret of the officers which should not be given in a court of justice and that to divulge the source of such information would be against public safety. The question was raised in this Court when the

case came before it on certiorari (275 U. S. 106, 110), but the Court did not find it necessary to decide the point.[2]

II

THE INDICTMENT CHARGES OFFENSES WITH SUFFICIENT PARTICULARITY

The petitioners contend that the indictment does not charge the crimes alleged with sufficient particularity. The indictment alleges the unlawful transportation in a Graham-Paige coupé and the unlawful possession of intoxicating liquor fit for use for beverage purposes, to-wit, whiskey, on December 10, 1929, in Grand Rapids, Kent County, Michigan, within the jurisdiction of the court. (R. 1–2.) The petitioners' objection is that the indictment does not specify the amount of the liquor, nor the time when or the place where it was illegally transported and possessed. We submit that the indictment contained all the essential elements of the offenses averred and duly informed the petitioners of the charges against them. See *Gurera* v. *United States*, 40 F. (2d) 338 (C. C. A. 8th); *Jacobs* v. *United States*, 24 F. (2d) 890 (App. D. C.); *Leonard* v. *United States*, 18 F. (2d) 208 (C. C. A. 6th); *Myers* v. *United States*, 15 F. (2d) 977 (C. C. A. 8th); *Hovermale* v. *United States*, 5 F.

[2] This point is discussed in detail and authorities bearing on it are collected on pp. 12–18 of the brief for the United States filed in that case, No. 195, October Term, 1927. Copies of that brief have been furnished to counsel for petitioners here.

(2d) 586 (C. C. A. 4th); *Pane* v. *United States*, 2 F. (2d) 855 (C. C. A. 8th). There is nothing in the record indicating that petitioners were taken by surprise or that they were in any doubt as to the offenses with which they were charged. Transportation and possession of intoxicating liquor in an automobile without a permit in any amount is unlawful at any time and at any place. The allegation that the offenses took place within the jurisdiction of the court is sufficient. Had petitioners desired further information, it could have been supplied by a bill of particulars *Durland* v. *United States*, 161 U. S. 306, 315. Such a bill was not asked for. If at any time in the future they should find it necessary to plead the record and conviction in this case in bar of another prosecution, the time and place, as well as the amount of liquor involved, may be shown by other proof. See *Dunbar* v. *United States*, 156 U. S. 185, 191.

In *Skelley* v. *United States*, 37 F. (2d) 503 (C. C. A. 10th), cited by petitioners in support of their contention that the indictment should have stated with more particularity the *place* of the commission of the offenses charged, the objection appears to have been raised by special demurrer. In the instant case the demurrer was general in form, and as no prejudice is shown, the objection is not available. R. S. Section 1025 (U. S. C., Title 18, Sec. 556). *Ledbetter* v. *United States*, 170 U. S. 606, 613; *Myers* v. *United States*, 15 F. (2d)

977 (C. C. A. 8th); *Leonard* v. *United States*, 18 F. (2d) 208 (C. C. A. 6th).

Petitioners further attack the indictment because it omits the word "knowingly." But the statute does not make knowledge an element of the offense. The indictment complied with Section 32, Title II, of the National Prohibition Act, which provides that "it shall be sufficient to state that the act complained of was then and there prohibited and unlawful."

Petitioners also object that the indictment did not expressly mention the Jones Act (*infra*, p. 23). It stated that the transportation and possession were in violation of the National Prohibition Act *as amended*, which of course includes all amendments, and it charged the commission of the alleged offenses subsequent to March 2, 1929, the effective date of the Act. Furthermore, the *offense* is defined by the National Prohibition Act; the Jones Act affects only the punishment to be imposed upon conviction.

The petitioners next contend that the indictment was insufficient because it did not advise them whether they were charged with a misdemeanor or a felony, or whether they were charged as casual or slight offenders or as habitual or commercial violators. This complaint is apparently based on the theory that the Jones Act created new offenses, for without that as a premise there is nothing upon which such argument can rest. But the Jones Act created no new offenses. Its obvious purpose was to increase the maximum penalties which might be

imposed for certain violations of the National Prohibition Act. The proviso to the Jones Act defines no new crime, but merely cautions the court to exercise a judicial discretion in the imposition of sentences. *Ross* v. *United States*, 37 F. (2d) 557 (C. C. A. 4th); certiorari denied, 281 U. S. 767; *United States* v. *Kent*, 36 F. (2d) 401 (S. D. Ill.). Contentions similar to those relied upon by petitioners were made in *McElvogue* v. *United States*, No. 167, October Term, 1930, in which this Court denied certiorari on October 13, 1930.

III

THE SENTENCES SHOULD NOT BE DISTURBED

Petitioners contend that the sentences can not be sustained under the second count, as held by the Circuit Court of Appeals, because the increased penalties under the Jones Act did not cover the offense of possession; that they can not be supported under the first count, because there was no evidence of prior conviction for transportation, and the penalties of the Jones Act can not be applied to an isolated case of transportation; that the prior convictions charged in the indictment related to possession on the part of Husty, and the sentence imposed on him exceeded that which could have been imposed under Section 29, Title II, of the National Prohibition Act.

It is true that the sentences are in excess of those provided for the possession of intoxicating liquor (See Sec. 29, p. 22, *infra*), and it is consequently obvious that the statement in the judgment of the

Circuit Court of Appeals "that the sentence was supported by conviction on the second count" (R. 62) is erroneous. As the judgment shows nothing about the first count and as the sentences were proper under the first count, it seems probable that this was a mere inadvertent error. As the evidence in regard to possession and transportation was practically the same, it seems highly improbable that the Circuit Court of Appeals intended to sustain the conviction only as to the count relating to possession.

The trial court had power under the Jones Act to impose a sentence for transportation of imprisonment not to exceed five years and a fine not to exceed $10,000. There was a general verdict of guilty, and the sentences imposed were general sentences which did not exceed those which might have been imposed under the first count. See *Abrams* v. *United States*, 250 U. S. 616, 619; *United States* v. *Trenton Potteries*, 273 U. S. 392, 401–402. Obviously, the proviso that Congress intended the court to use discrimination in imposing sentences was not intended as a limitation upon the power of the court. If the sentences were within the discretion of the trial court, petitioners' only recourse is to the executive. The court in imposing the sentences no doubt took into consideration the evidence in the case. See *Ross* v. *United States, supra* (p. 559).

The validity of the sentences is further questioned on the ground that they contravene the con-

stitutional provision relating to *ex post facto* laws. The contention of the petitioners apparently is that in applying the proviso of the Jones Act the trial court may not consider violations of the National Prohibition Act occurring prior to the enactment of the Jones law. We submit that this is unsound. In support of this contention petitioners rely upon *Cisson* v. *United States*, 37 F. (2d) 330 (C. C. A. 4th). That case is not in point. There, a "second offense" of sale was committed prior to the passage of the Jones Act and the question involved was whether that Act repealed the provision of the National Prohibition Act prescribing the punishment for such an offense.

CONCLUSION

No adequate ground is presented for disturbing the judgment of the court below, and it should therefore be affirmed.

Respectfully submitted.

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JANUARY, 1931.

APPENDIX

STATUTES INVOLVED

Section 3, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 308 (U. S. C., Title 27, Sec. 12):

> No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, manufacture, sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all the provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.
>
> Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished and possessed, but only as herein provided and the commissioner may, upon application, issue permits therefor: *Provided*, That nothing in this Act shall prohibit the purchase and sale of warehouse receipts covering distilled spirits on deposit in Government bonded warehouses, and no special tax liability shall attach to the business of purchasing and selling such warehouse receipts.

Section 26, p. 315 (U. S. C., Title 27, Sec. 40):

> When the commissioner, his assistants, inspectors, or any officer of the law shall discover any person in the act of transporting

in violation of the law, intoxicating liquors in any * * * automobile * * * it shall be his duty to seize any and all intoxicating liquors found therein being transported contrary to law. Whenever intoxicating liquors transported or possessed illegally shall be seized by an officer he shall take possession of the * * * automobile * * * and shall arrest any person in charge thereof. Such officer shall at once proceed against the person arrested under the provisions of this title in any court having competent jurisdiction; * * *

Section 29, p. 316 (U. S. C., Title 27, Sec. 46):

Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment.

Act of March 2, 1929, c. 473, 45 Stat. 1446 (U. S. C. Sup. III, Title 27, Secs. 91, 92), amending the National Prohibition Act, and commonly known as the Jones Act:

> That wherever a penalty or penalties are prescribed in a criminal prosecution by the National Prohibition Act, as amended and supplemented, for the illegal manufacture, sale, transportation, importation, or exportation of intoxicating liquor, as defined by section 1, Title II, of the National Prohibition Act, the penalty imposed for each such offense shall be a fine not to exceed $10,000 or imprisonment not to exceed five years, or both: *Provided,* That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law.
>
> SEC. 2. This Act shall not repeal nor eliminate any minimum penalty for the first or any subsequent offense now provided by the said National Prohibition Act.

U. S. GOVERNMENT PRINTING OFFICE: 1931

SUPREME COURT OF THE UNITED STATES.

No. 477.—October Term, 1930.

Richard Husty and Charles Laurel, Petitioners, *vs.* United States.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[February 24, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

Petitioners were convicted in the District Court for Western Michigan upon two counts of an indictment, the first for transporting, and the second for possessing, intoxicating liquors in violation of the National Prohibition Act. They had been apprehended while in an automobile, and arrested without warrant. The officers had searched the automobile, without warrant, and found a quantity of intoxicating liquor, which they had seized. A motion by petitioners to suppress the use as evidence of the information thus acquired, on the ground that the arrest and the search and seizure were illegal, was denied. Each count of the indictment set forth a single offense; and the second, that for possession, alleged two prior convictions of petitioner Husty for unlawful possession. Petitioners were sentenced generally on the indictment, without reference to either count, Husty to five years' imprisonment and to pay a fine of $3000, and Laurel to imprisonment for one year and six months.

In the course of the proceedings before the District Court, petitioners, by appropriate motions and exceptions, challenged the correctness of the order denying the motion to suppress evidence; the sufficiency of the indictment; and the legality of the sentences, the last on the grounds that they were not authorized by the Jones Act of March 2, 1929, c. 473, 45 Stat. 1446, and exceeded the maximum penalties which could be imposed under § 29 of the National Prohibition Act.

The Court of Appeals for the Sixth Circuit, without opinion, affirmed the convictions under both counts and held the sentences to be supported by the convictions upon the second count—that for possession—alone. This Court granted certiorari, 282 U. S. —, Nov. 24, 1930, on a petition which asked review of the rulings of the District Court which have been mentioned, the government op-

posing on the ground, among others, that the sentences were proper under the possession count.

1. In the proceeding to suppress evidence, one of the prohibition officers who made the arrest testified that he had known Husty to be a "bootlegger" for a number of years before the arrest, and had arrested him in 1922 and 1928 for violations of the National Prohibition Act, both arrests resulting in conviction and the second in imprisonment. On the day of petitioners' arrest, the witness had received information over the telephone that Husty had two loads of liquor in automobiles of a particular make and description, parked in particular places on named streets. The witness was well acquainted with his informant, having known him for about eight years, and had come in frequent contact with him in business and socially. The same person had given similar information to the witness before, which had always been found to be reliable. The officer believed the information, and, acting upon it, found one of the cars described, at the point indicated, and unattended. Later, petitioners and a third man entered the car. Husty had started it when he was stopped by the officers. Laurel and the third man fled, and the latter escaped. The officers, believing that the car contained intoxicating liquor, searched it, and found eighteen cases of whiskey.

The Fourth Amendment does not prohibit the search, without warrant, of an automobile, for liquor illegally transported or possessed, if the search is upon probable cause; and arrest for the transportation or possession need not precede the search. *Carroll* v. *United States*, 267 U. S. 132. We think the testimony which we have summarized is ample to establish the lawfulness of the present search. To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act. *Dumbra* v. *United States*, 268 U. S. 435, 441; *Carroll* v. *United States, supra.* It is enough if the apparent facts which have come to his attention are sufficient, in the circumstances, to lead a reasonably discreet and prudent man to believe that liquor is illegally possessed in the automobile to be searched. See *Dumbra* v. *United States, supra; Stacy* v. *Emory*, 97 U. S. 642, 645.

Here the information, reasonably believed by the officer to be reliable, that Husty, known to him to have been engaged in the illegal traffic, possessed liquor in an automobile of particular description and location; the subsequent discovery of the automobile at the point indicated, in the control of Husty; and the

prompt attempt of his two companions to escape when hailed by the officers, were reasonable grounds for his belief that liquor illegally possessed would be found in the car. The search was not unreasonable because, as petitioners argue, sufficient time elapsed between the receipt by the officer of the information and the search of the car to have enabled him to procure a search warrant. He could not know when Husty would come to the car or how soon it would be removed. In such circumstances we do not think the officers should be required to speculate upon the chances of successfully carrying out the search, after the delay and withdrawal from the scene of one or more officers which would have been necessary to procure a warrant. The search was, therefore, on probable cause, and not unreasonable; and the motion to suppress the evidence was rightly denied. *Carroll* v. *United States, supra.*

In the course of the hearing on the motion, questions by petitioners seeking to establish the name and identity of the officer's informant, were excluded. Petitioners ask review of these rulings on the evidence, but we do not consider them, since they were not assigned as error on the appeal to the Court of Appeals, and it does not appear that they were presented or passed upon there. *Duignan* v. *United States*, 274 U. S. 195, 200.

2. The indictment is in the form authorized by § 32 of the National Prohibition Act. It charges the transportation of intoxicating liquor as a first offense by both petitioners, and possession as a first offense by Laurel, and as a third offease by Husty, at a named time, and at a place within the jurisdiction of the court. Failure to state more specifically the amount of the liquor, and the time and place of the offenses charged, does not affect the validity of the indictment. It was at most ground for a bill of particulars if timely application had been made. See *Durland* v. *United States*, 161 U. S. 306, 315.

It is urged that the indictment is defective, because it fails to state whether the offenses charged were felonies or misdemeanors, and whether the petitioners were charged with casual or slight violations, or habitual sales of intoxicating liquor, or attempts to commercialize violations of the law, which, petitioners argue, were made new or aggravated offenses by the Jones Act.

But the Jones Act created no new crime. It increased the penalties for "illegal manufacture, sale, transportation, importation or exportation", as defined by § 1, Title II of the National Prohibition Act, to a fine not exceeding $10,000, or imprisonment not exceeding five years, or both, and added as a proviso, "that it is

he intent of Congress that the court, in imposing sentence here-
nder, should discriminate between casual or slight violations and
abitual sales of intoxicating liquor, or attempts to commercialize
iolations of the law." As the Act added no new criminal offense
those enumerated and defined in the National Prohibition Act,
added nothing to the material allegations required to be set out
indictments for those offenses. The proviso is only a guide to
e discretion of the court in imposing the increased sentences for
ose offenses for which an increased penalty is authorized by the
et. See *Ross* v. *United States*, 37 F. (2d) 557; certiorari
enied, 281 U. S. 767. *McElvogue* v. *United States*, 40 F. (2d)
9; certiorari denied, 282 U. S. —, Oct. 13, 1930.

3. The sentence imposed on each of the petitioners exceeded the
aximum penalty for illegal possession under § 29 of the National
rohibition Act, which is, for a first offense, $500 fine, and for a
ird offense, "not less than $500" fine and not more than two
ars' imprisonment. As illegal possession is not one of the
enses enumerated in the Jones Act for which increased penalties
provided, and as the sentences imposed exceed any authorized
§ 29 of the National Prohibition Act, the court below was in
or in holding that they were supported by convictions on the
ond count, that for possession.

Since the convictions were upheld under the first count, sen-
ces under the Jones Act were authorized, transportation being
of the offenses enumerated in that Act. But the possession al-
ed in the second count was not in itself necessarily an aggrava-
of the transportation charge which would warrant heavy sen-
es under the Jones Act as to either petitioner, and could not
as to Laurel, who, so far as the evidence shows, was a first
nder both as to the transportation and possession. While the
trict Court may have had before it facts other than those ap-
ring of record which it was entitled to consider in imposing
tence under the Jones Act, we think, in view of the confusion
ch has arisen with respect to the propriety of the sentences
er the possession count, that the District Court should be af-
ded an opportunity in its discretion to resentence the petitioners
he view of the applicable statutes, as stated.

he judgment will be reversed and the cause remanded to the Dis-
t Court for further proceedings in conformity with this opinion.

Reversed.